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REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF COLORADO,

CONTAINING

**ALL CASES DECIDED AT THE APRIL TERM, 1887, THE
SPECIAL OCTOBER TERM, 1887, AND PART
OF THE DECEMBER TERM, 1887.**

BY L. B. FRANCE.

VOL. X.

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DAVID ATWOOD,
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JUSTICES OF THE SUPREME COURT

OF THE

STATE OF COLORADO.

WILLIAM E. BECK, CHIEF JUSTICE.

JOSEPH C. HELM,	}	ASSOCIATE JUSTICES.
SAMUEL H. ELBERT,		

SUPREME COURT COMMISSION.

THOMAS MACON.¹ AMOS J. RISING.

JOHN C. STALLCUP. ALLISON H. DE FRANCE.²

JAMES A. MILLER, CLERK:

ALVIN MARSH, ATTORNEY GENERAL.

¹ Resigned December 2, 1887.

² Appointed same day to fill the place of Commissioner Thomas Macon.

MEMORANDUM.

By an act of the legislature, approved March 7, 1887, the governor was authorized by and with the advice of the senate to appoint three supreme court commissioners; such commissioners to possess the same qualifications and be subject to the same restrictions as the justices of the supreme court; to hold office for two years unless their services should be dispensed with by law or by order of the supreme court. Vacancies occurring during a recess of the senate to be filled by appointment by the governor. The commissioners to be subject to the rules and orders of the supreme court; to consider and report upon all cases referred to them by the court, and to perform such other services as the court shall require; reports to be in writing, signed by one commissioner, and show which concur therein and which dissent; report shall contain statement of facts and citation of authorities relied upon. The court may provide for hearing of oral arguments before the commissioners. No cause shall be referred to the commissioners in which they or any of them are or were interested as counsel or otherwise. The supreme court may modify or reject any report, and when a report shall be approved and adopted it shall be promulgated as the opinion of the court, filed and reported and judgment entered the same as in other cases determined by the court.

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CASES AT LAW AND IN CHANCERY

DETERMINED IN THE

SUPREME COURT OF THE STATE OF COLORADO.

APRIL TERM, 1887.

DENVER & RIO GRANDE R'Y CO. V. HENDERSON.

1. The owner of stock injured by a railroad train upon full compliance with the requirements of the statute is entitled to recover without proving negligence.
2. But failing to comply with the statute, such party may still maintain his action at common law, and in such case he is required to establish negligence.
3. Error in overruling a defendant's motion for a nonsuit is obviated by evidence offered in his own behalf which supplies the defect existing in plaintiff's proofs.

Appeal from County Court, Fremont County.

THE present action was brought by appellee against the appellant company to recover damages for the killing of appellee's cow by one of the company's trains. In the county court, appellant (defendant) filed a plea in abatement, setting up, among other things, that plaintiff had not complied with section 2571 of the General Laws, being section 2805 of the General Statutes. The cause was tried by a jury. When plaintiff rested, appellant moved for a nonsuit, which motion was denied. There-

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upon appellant offered evidence on its own behalf. Verdict and judgment for appellee.

Mr. JOHN M. WALDRON, for appellant.

Mr. C. E. WALDO, for appellee.

HELM, J. No effort is made to show a compliance, or an attempted compliance by plaintiff, with the statute relating to damages for the injuring or killing of stock by railroad companies in operating their trains. Sec. 2804 *et seq.*, Gen. St. The action, therefore, cannot be maintained under the statute, and this presents the first question we are to consider, viz., Does the statute furnish an exclusive remedy for the recovery of such damages?

At common law the owner of animals which, without fault on his part, are killed or maimed through the negligence of railroad companies, their agents or employees, is entitled to recover a fair compensation for the injury thus inflicted. Section 2 of our statute, being section 2804 aforesaid, must be construed in connection with the remaining provisions of the act. Thus construing the act, we cannot say that, in express terms or by clear implication, it repeals or suspends the common-law right of action mentioned. The statute is, in our judgment, simply cumulative. The object of the legislature was not to interfere with the owner's existing rights, but, owing to the difficulty of establishing negligence, to give him additional relief. Upon a full and careful compliance by the owner of the animal injured with the requirements of the act, he would seem to be entitled thereunder to the compensation fixed or proven, as the case may be, regardless of the question of negligence on the part of the defendant company. Failing to comply with the statute, however, such owner may still have his common-law action.

These views do not conflict with the position taken in *Atchison, T. & S. F. R. R. Co. v. Lujan*, 6 Colo. 338. An

examination of the files in that case reveals the fact that this question was not there presented or argued, and the opinion shows that it was not passed upon. We are fairly warranted in the conclusion that that case was instituted and tried under the statute, and that in the trial the objection of a partial failure to comply with the preliminary requirements of the act was not urged, or in any way taken advantage of. The opinion declares that by such conduct defendant waived the objection. There is no language announcing that an action at common law in such cases cannot be maintained.

It is necessary, however, for plaintiff, when he does not invoke relief under the statute, but attempts to make his case at common law, to offer in the first instance evidence showing, or fairly tending to show, negligence on the part of the defendant whereby the injury resulted. This burden is upon him. Proof of the injury occasioned by the defendant's locomotive striking plaintiff's animal, and the damages resulting therefrom, does not *prima facie* establish negligence. *Pierce*, R. R. 428, and cases cited in note 1; *Whart. Neg.* § 899, and cases cited; *Redf. Rys.* § 126; and cases cited.

It is, of course, to be remembered, that while in this state the owners of animals may permit them to run at large, the railroad company, upon the other hand, is under no obligation to fence its road or track. In view of these facts, we are not prepared to say that defendant's motion for a nonsuit was properly denied. It is, however, unnecessary for us to determine the question. After the motion was refused, defendant proceeded to offer evidence on his own behalf. In so doing, it sufficiently supplied the defect existing in plaintiff's proofs as to this subject, and thereby waived its right to be heard here upon the erroneous ruling, if such there were.

The engineer who was in charge of the engine that struck plaintiff's animal was placed upon the witness stand, and his testimony fairly tended to establish negli-

gence. He practically admitted that, had the fireman or himself been looking out the right side of the cab as it rounded the curve described, an animal upon the track or near it might have been seen in time to stop the train; also that the ground was clear of obstacles for a considerable distance on either side of the track where the accident occurred. From these admissions, and other testimony of the engineer, coupled with the declaration of plaintiff's witness that the cow could have been seen from the point where she was lying after the injury, by one upon the engine of the train going east, for one hundred and fifty or two hundred yards, we cannot say there was no proof whatever of negligence. Enough appeared to warrant the final submission of this question to the jury; and, under all the evidence, we do not feel justified in disturbing their verdict.

The judgment is accordingly affirmed.

Affirmed.

DENVER & R. G. R'y Co. v. HENDERSON.
SAME v. ZASTROW.

Appeal from County Court, Fremont County.

Mr. J. M. WALDRON, for appellant.

Mr. C. E. WALDO, for appellees.

PER CURIAM. These cases, like that of *Denver & R. G. R'y Co. v. Henderson*, ante, p. 1, are actions for damages for the killing of stock by the appellant company's trains. The leading questions of law involved are precisely the same as those considered and determined in the case mentioned. It is therefore unnecessary to repeat a discussion of them. Treating the proceedings as actions at common law, plaintiffs, we think, offered sufficient evidence on the question of negligence to warrant submitting the causes to the jury.

In the *Henderson Case* the proofs of the plaintiff tended to show that the cow, at the time of the accident, was lying between the rails; that from the engine, going west, she could have been seen five hundred yards, and going east, from one hundred to two hundred yards; that she was probably struck by the west-bound train; and that a passenger train, running at the usual speed, could at that point be stopped within one hundred feet of the spot where the signal to stop was given.

In the *Zastrow Case* the evidence of plaintiff tended to show that the colt killed was struck by the train going west; that it ran along the track, before being struck, for about fifty yards; that it could have been seen by a person on the train five or six hundred yards from the place where it appeared to have received the injury; that for a distance of fifty to one hundred yards on each side of the track there were no obstacles to obstruct the view; and that, at the place where this animal was struck, a passenger train, running at the regular rate of speed, could also be stopped within one hundred feet of the spot where the signal was given.

In view of the foregoing testimony, there being nothing to contradict or rebut the same, we think both cases were properly submitted to the jury, and shall decline to set aside the verdicts.

The judgments in both are affirmed.

Affirmed.

BREEZE, COUNTY TREASURER, ETC., V. HALEY.

- 1. General Statutes 1883, section 2825, and Session Laws 1885, page 317, section 1, vest the board of county commissioners with power almost unlimited to correct any errors that may occur in an assessment, either before or after the payment of taxes thereon, and an injunction will not issue to restrain the collection of a tax, at the suit of a property owner alleging that the assessor himself had assessed the property, on an excessive valuation, without giving him an opportunity to make a return.

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20a	313

2. Where no injury is caused by the delay, the failure of the assessor to complete the assessment for delivery to the county clerk by June 25th, the date fixed by General Statutes 1883, section 2856, will not render the tax invalid. Where the assessment was made out and delivered during the first meeting of the board of equalization in July, held to be a substantial compliance with the statute.
8. The fact that the weather, feed and market were unfavorable at the time the treasurer distrained the horses and cattle of the plaintiff for a tax is no ground for injunction to restrain the sale, especially when the plaintiff, by his conduct and requests for time, induced the delay to a season so unfavorable to an advantageous sale.

Appeal from District Court, Clear Creek County.

THIS is an action brought by Ora Haley against Breeze, as treasurer of Routt county, to enjoin him from the collection of certain taxes assessed against the property of Haley. By his complaint Haley admits that he failed to make out and return a list of his property for taxation for the year 1884, and alleges that the assessor of the county called on his foreman in charge of his property for a list and return some time in May, but refused to wait until the foreman could make the same; but immediately made out and returned a list of his property, listing and charging him with nine hundred and sixty acres of land, assessed at a valuation of \$2,880, while he had but six hundred and forty acres of land, and of the valuation of \$1,920; with eight thousand two hundred head of cattle, assessed at a valuation of \$163,000, while he had but six thousand three hundred head of cattle in said county, and of the valuation of \$120,000; and with one hundred and sixty-five head of horses, assessed at a valuation of \$6,845, while he had but one hundred and forty-one head of horses, and of the value of \$4,935; that the assessor so wrongfully listed and assessed the property of the plaintiff for taxation knowing the same was wrong, and for the purpose of oppressing plaintiff, and for the same purpose had knowingly and wilfully omitted to list and assess other property in the county, for the purpose of making the taxes of plaintiff greater than his

just share thereof, and did thereby increase the amount of his taxes, and that one of the members of the board of county commissioners, as well as the defendant treasurer, well knew of the same; that no blank list for listing his said property had ever been left with him or his agent; that the assessor never took and subscribed the oath to his report of assessments; that the county clerk never gave any notice of the meeting of the board of county commissioners to act as a board of equalization in the year 1884; that the said board held no such meeting that year; that he filed with said board an application to correct the said list made and filed by the assessor as soon as he knew of it, and that the said board of county commissioners did not take any action upon the same, "inasmuch as there was only two commissioners qualified and acting as such in the said county of Routt, and they were divided, and continued to be divided," and that said application was never acted upon by the board of equalization; that the amount of taxes he is charged with for said year 1884 upon his said property is \$4,248.59, but, on account of charging him with more property than he had in said county, and on account of omitting to list and assess other property in said county subject to taxation, he does not know what the amount of his just taxes are; that he had always been able and willing to pay the just amount; that the treasurer was making distraint of his said cattle and horses to make the said tax; that the weather was inclement, and very unfavorable to gathering or handling such stock, and of great damage to them; that there was a poor market for them; and asks for an injunction, etc.

A temporary injunction was ordered. A motion to dissolve injunction was made; and during the hearing, February 12, 1887, an amendment to the complaint was filed, alleging that no assessment roll or tax schedule, or list upon which to found a tax for 1884, was ever made or existed; that the only one ever made was then in pos-

session of John M. Breeze; that said Breeze was county attorney of Routt county; that the assessor made and returned no tax list or schedule whatever for 1884, listing the plaintiff's property for 1884.

Before the filing of this amendment defendant had answered, denying all the material allegations of the complaint, except that there is no response to the language in the complaint, "inasmuch as there were only two commissioners qualified and acting as such in the said county of Routt." So, at the hearing on the motion to dissolve, the treasurer showed that notice had been given of the meetings of the board of county commissioners as a board of equalization in July, 1884; that said board did so meet and hold its meeting as a board of equalization on the first Monday in July of 1884, and was in session as provided by the statute, and did hold its second meeting, commencing on the third Monday in July; that no change of the assessment of the property of plaintiff, as returned by the assessor, was made at the first meeting, and no complaint of the same was made at the second meeting.

On July 9 the following from plaintiff was filed:

"LARAMIE CITY, WYOMING, June 27, 1884.

"*To the Honorable Board of County Commissioners of Routt Co., Colo.:*

"DEAR SIRs — As I have not listed my Routt county property for taxation for the year of 1884, I consider it quite necessary for me to make an explanation and statement. I have not been to my Lay Creek ranch since the last of April. Neither have I heard anything from the assessor regarding it, and there has been no one at my ranch competent to list my property, my foreman being a new man there. There has been no blanks sent me here, and I have been unable to find any at this place, or at Rawlins, of the Colorado form; so, under the circumstances, all I can do at this late date is to make this statement, which I trust will take precedence over any

circulated reports from any prejudiced persons regarding my Routt county property.

“In addition to my property of 1883, I have three additional one-fourth sections of four hundred and eighty acres.

Improvements on same, \$150 each.....	\$450
I have eleven yearling colts, \$25 each.....	275
I have sixteen hundred head more cattle, at \$30.....	48,000
Additional improvements on public lands.....	200
	<hr/> \$48,925

“Trusting this, in addition to my assessment of 1883, may be satisfactory, I remain, most respectfully,

“ORA HALEY.”

The list for the previous year referred to was not by plaintiff, but by the assessor, wherein it appears that three thousand five hundred head of horses and cattle only were listed, at a valuation of \$42,000.

The next from plaintiff was of date October 3, 1884, and was received and filed October 6, 1884, and is as follows:

“RAWLINGS, WYO., October 3, 1884.

“*To the Hon. Board of County Commissioners of Routt County, Colorado:*

“DEAR SIRS — Below please find sworn statement of my Routt county property as should have been listed for taxation on May 1, 1884, which I trust will receive your just consideration. I have land proofs for six hundred and forty acres only, which cost about \$3 per acre; improvements on same not to exceed \$650; improvements on school and other public lands, \$500. I was the owner of one hundred and forty-one horses only, in the county, not worth more than \$35 per head, and three mules. I did not have to exceed six thousand three hundred head of cattle in the county; wagons and farming implements, \$300. Trust you will adjust this before the levy.

“Very respectfully,

ORA HALEY.

“Subscribed and sworn to before me this 3d day of October, A. D. 1884.

A. G. EDGERTON, J. P.”

This is the application referred to in the complaint, and upon which it is said the commissioners were unable to agree, "inasmuch as there were but two," and were divided. The proof shows that on October 6, 1884, the board, two members being present, did consider the same, and agreed and decided that the list and assessment, as returned by the assessor, was correct, and the same was so entered at their meeting of October 6, 1884, on the records of the board. That in March, 1885, the treasurer attempted to collect this tax by distraint, but was temporarily restrained at the suit of plaintiff, which order was afterwards vacated and suit dismissed; and as late as October 7, 1886, the following was sent to plaintiff by the board:

[COPY.]

" OCTOBER 7, 1886.

" *Ora Haley, Esq., Laramie City, Wyoming:*

" DEAR SIR — We have to say, in reference to the matter of your taxes, that we are unable to take any action in the matter of reduction of your taxes for the year 1884, for one main reason that you have no written application on file with our clerk for any reduction, and you are advised that you must pay your taxes, and then, if you desire any relief, you must furnish us with an application for reduction, accompanied by proof, in affidavits or witnesses produced before us, showing that you have been erroneously assessed for the year 1884. If your proof is sufficient to satisfy us that your claim for such reduction is just and proper, we will do justice by you in the matter. Please give the matter your attention at once, if you desire any relief of any kind from the board. We are compelled to make our rule for the disposal of these reduction and rebate cases uniform, and require all parties who feel aggrieved at their assessment to make such a showing here as would be sufficient to establish the merits of the claim. We think the board has full power to act in this matter, under section 2825, page 823, Revised Statutes of Colorado.

" Yours respectfully,

THOMAS H. ILES."

[Indorsed:] "2973. Affidavit of Thomas H. Iles, member board county commissioners, in support of motion to dissolve injunction of Ora Haley v. L. H. Breese, County Treas. Exhibit L."

This letter was duly received by plaintiff. The evidence showed that the assessor left a blank list or schedule for listing property of plaintiff with his foreman in charge, about the 15th day of May, 1884, and that he waited for a return of the same until the first meeting of the board in July. In the meantime, having made inquiries of persons informed, and who had been in plaintiff's employ, as to the amount of his property, at which time he filled out and delivered the list complained of; that no property liable to taxation had been omitted by him to his knowledge, nor to the knowledge of the board or the treasurer; no bad faith of any kind shown, while the evidence shows good faith on the part of the defendant and officers of the county. The evidence sustains the regularity of all the proceedings, except as to there being but two county commissioners acting on October 6, 1884. There is no evidence on this except Haley's statement that there were but two commissioners; that one of them had not qualified; and the other fact that the assessor waited till after June 25th before making his return of assessments. There is a great deal of evidence showing that it was a difficult matter to round up and sell stock at the time the treasurer attempted it; also evidence that plaintiff requested a delay till January 1, 1887, and that the treasurer declined to wait that long, but agreed to wait till November 20th; but proceeded to distrain about the last of November, 1886, and was stayed by the writ in this cause on December 13th. The evidence shows that the board of county commissioners were at all times willing and desirous to hear plaintiff, and receive proofs of any errors in the 1884 assessment, and to correct the same if found to be erroneous.

Messrs. D. E. PARKS and J. M. BREEZE, for appellant.

Mr. W. T. HUGHES, for appellee.

STALLCUP, C. The injunction proceedings of the plaintiff cannot be maintained. He has shown no equity to warrant the same. He had a plain, adequate remedy for the correction of any errors in the enlistment and assessment of his property for the year 1884, by application to the board of county commissioners, sitting as a board of equalization, in July. *People v. Lothrop*, 3 Colo. 465; *Price. v Kramer*, 4 Colo. 546; *State Railroad Tax Case*, 92 U. S. 575; *Cooley, Tax'n*, 536.

He has had, and still has, a plain, adequate remedy for any wrong that may have been done to him in the listing and assessing of his property for the year 1884, under the provisions of our statutes vesting the board of county commissioners with power almost unlimited to correct any errors that may occur in an assessment, either before or after the payment of taxes thereon. Sec. 2825, p. 823, Gen. St. 1883; sec. 1 of Act, p. 317, Sess. Laws 1885.

It was the plaintiff's duty, by himself or his agent, to make and return to the assessor a list of his property liable to taxation, by the 20th day of May, and upon his failure so to do, it became the duty of the assessor to make out such list for such delinquent. Sec. 2841, p. 827, Gen. St. 1883. The plaintiff failed in his duty in this regard, so the act of the assessor in listing and assessing the same was but the performance of his duty. The plaintiff asserts that in so doing the assessor listed, charged and assessed him with more property than he owned in the county. If so, he had a plain, adequate remedy under the statutes cited. The plaintiff failed to apply to the board of equalization for a correction of errors in his assessment, and failed to make any satisfactory showing before the board of county commissioners, or to produce any evidence of errors in his

assessment; and even down as late as the October meeting of 1886, after solicitation on the part of the commissioners to produce evidence of errors, he failed to appear or to produce any evidence, and has constantly ignored the remedies provided for the wrongs of which he complains.

It is urged by counsel for plaintiff that, as the assessor did not complete plaintiff's assessment for delivery by June 25th, as provided by section 2856 of General Statutes, but did make it out and deliver it during the first meeting of the board in July, that it was thereby without validity. There was no injury caused by the delay, and we think there was a substantial compliance with the statute, so that its objects and purposes were sufficiently met. *Burlington & M. R. Co. v. Saline Co.* 11 N. W. Rep. 855.

It is also urged by plaintiff's counsel that it is admitted by the state of the pleadings that there were but two commissioners of the county at the time of the meeting, October 6, 1884. This was not alleged as a ground of complaint by plaintiff, and, in any event, only applies to the day mentioned, and, as it does not appear that the plaintiff's rights were in any manner prejudiced by the circumstances, it must therefore be treated as immaterial to the decision of this case.

The fact that the weather, feed and market were unfavorable at the time the defendant proceeded to distrain the horses and cattle of plaintiff for the tax seems to be relied upon as a ground for sustaining the injunction. The position is untenable. Besides, the plaintiff, by his conduct and requests, in a great measure induced the delay to this unfavorable time.

The injunction should be dissolved, and the order denying the motion to dissolve reversed.

RISING and MACON, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the order of the district court denying the

14 COM'RS OF SUMMIT CO. V. PEOPLE EX REL. [April T.,

motion to dissolve the injunction is reversed, and the cause remanded, with directions that the injunction be dissolved, and the cause dismissed.

Reversed.

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BOARD OF COUNTY COM'RS OF SUMMIT CO. V. PEOPLE EX
REL. HURLBUT.

A county, under a statute authorizing the funding of its floating indebtedness, by an election conducted in substantial conformity to the statute, voted to issue bonds as a means of funding such indebtedness. *Held*, that the plaintiff, a holder of county warrants constituting a part of such floating debt, was entitled, upon tendering his warrants, and refusal on the part of the county commissioners to issue to him bonds to the amount of such warrants, to a *mandamus* to compel them to do so.

Appeal from an order of the judge of the District Court of the Fifth Judicial District, awarding a peremptory writ of mandamus.

Mr. J. H. RICHARDS, for appellant.

Mr. H. M. ORAHOD, for appellee.

BECK, C. J. The application for the peremptory writ of *mandamus* was submitted to the judge of the court below upon the petition of Hiram E. Hurlbut, the party in interest, and upon an agreed statement of facts signed by the counsel representing the respective parties to the controversy. The petition alleges that said Hurlbut was, at the time of presenting his said petition, and had been for two years immediately preceding, the legal owner and holder of more than \$5,000 of the floating indebtedness of said Summit county, which was evidenced by the orders or warrants of said county duly issued and duly registered as by law required; that said warrants had been presented for payment, and payment refused for want of funds; that he has also offered to surrender

said warrants to the board of county commissioners of said county, and demanded of said board and of its chairman the bonds of said county in exchange therefor, but that said board of county commissioners, and the chairman thereof, have refused to issue to him bonds in lieu of said county warrants. Other allegations of fact necessary to confer jurisdiction are contained in the agreed statement of facts, which by reference is made part of the petition. Said agreed statement likewise recognizes, as part and parcel of the case presented for the judgment of the court, the facts alleged in the petition proper.

It is thus alleged that, for many years prior to the presentation of the petition for the peremptory writ of *mandamus*, the floating debt of said county has exceeded the sum of \$10,000, and that this floating debt is "evidenced by county orders or warrants regularly and duly issued and presented for payment to the treasurer of said county, and not paid for want of funds, and were duly registered as by law required;" that proceedings for the funding of said floating indebtedness, under the provisions of the statute authorizing the funding thereof, and the issue of county bonds to the holders of such outstanding county warrants, were regularly and legally instituted prior to the last general election held in said county. All the various steps necessary to the submission of the question of funding said county indebtedness to the legal voters of said county qualified by law to vote thereon are set out in detail, and show a substantial compliance with all the provisions of the statute. It further appears that said question was duly submitted to such qualified electors at the general election held in said county November 2, 1886, and that a majority of the votes cast thereon was in favor of the funding of said indebtedness. It is stipulated and agreed by the respective parties that the law relating to the funding of said county indebtedness was fully complied with in everything pertaining thereto, except it may have been an

irregularity mentioned which occurred in two precincts, which precincts together cast not to exceed sixteen votes on this question, and which votes in no manner affected the result of said election.

We are of opinion that the facts thus presented show a substantial compliance with all the requirements of the statute in the holding and conducting of said election upon this question, and in the submission of said question to the electors qualified to vote thereon. The result of said election being in favor of funding the county indebtedness by the issuing of county bonds in exchange for the outstanding warrants of said county in manner specified in the statute, we are also of opinion that the county commissioners are authorized, and that it is their duty, to proceed and carry out the provisions of the statute. If, then, the relator is the owner and holder of valid county warrants covered by and included within the funding proceedings, he is clearly entitled to the relief sought. Upon this point we must assume, from the conceded facts appearing in the record before us, that the orders or warrants of said county held by the relator, and which he has offered to surrender in exchange for county bonds in accordance with the provisions of the statute, are valid warrants, and in all respects come within the class covered by the funding proceedings. Upon this proof of their validity, and other prerequisites, we base our judgment that the relator is entitled by law, on presenting said warrants to the county commissioners of said Summit county, to have county bonds issued to him therefor as prayed for in his said petition.

The action of the district judge, therefore, in ordering a peremptory writ of *mandamus* to issue to said county commissioners, is affirmed.

Affirmed.

SMITH V. BOARD OF COUNTY COMMISSIONERS OF JEFFERSON COUNTY.

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16a	518
16a	519

1. The statutes vest in the county superintendent of schools a large discretion as to the services necessary to be performed by him in the discharge of his official duty.
2. When he renders to the board of county commissioners an account of his services and mileage for a month or a quarter of a year, made out and verified as the law requires, he has established a *prima facie* case in his favor. No authority exists to reject any item or charge upon inspection merely, unless it clearly appears therefrom that such item is incorrect or illegal.
3. Courts are not disposed to interfere with the exercise of mere discretionary authority.
4. Every reasonable intendment is to be made in favor of the acts of public officers, who are sworn to perform their official duties correctly, so long as they appear to be acting in good faith, with due care and discretion, and within the limits of their conceded powers.
5. The law does not recognize fractions of days. And when it provides a *per diem* compensation for the time necessarily devoted to the duties of an office, the officer is entitled to his daily compensation for each day on which it becomes necessary for him to perform any substantial official service, if he does perform the same, regardless of the time occupied in its performance.
6. Under the statute the accounts of the county superintendent of schools should be kept in such a manner that the officer may not only be able to itemize his accounts as required, but to explain them as well, if called upon to do so.

Appeal from District Court, Jefferson County.

APPELLANT was county superintendent of the schools of Jefferson county in the year 1886. He rendered to the board of county commissioners on April 5th of said year his account for services and expenditures for the months of January, February and March, amounting in the aggregate to the sum of \$465.25. The county commissioners allowed upon said account the sum of \$330.65, and rejected the balance. Thereupon said officer appealed from the decision of said board to the district court of Jefferson county, and upon trial of the cause before said court, without a jury, his recovery was still

further reduced to the sum of \$310.65. From the latter judgment he has prosecuted an appeal to this court. The errors assigned relate to errors of law alleged to have been committed by the district court in disallowing legal and proper items of appellant's account.

Mr. L. S. SMITH, for appellant.

Mr. JOSEPH MANN, for appellee.

BECK, C. J. The findings of the district court disclose that certain items of the appellant's account were rejected because not deemed proper charges against the county; that other items were not duly proven, and that certain charges were not itemized as the statute requires. The correctness of these rulings is questioned in the present proceeding, and since the question raised by the assignments of error involve a construction of sections 3015 and 3020, pages 884 and 885, General Statutes, we here insert those sections:

"Sec. 3015. It shall be the duty of the county superintendent to exercise a careful supervision over the schools of his county; to visit each school at least once each quarter it is in session; to see that all the provisions of this act are observed and followed by teachers and school officers; to examine the accounts of the district officers, to see if such accounts are properly kept, and all district funds are properly accounted for; to keep, in a good and substantial bound book, a record of his official acts, and of other matters required by law to be recorded; to obey the legal instructions of the state superintendent; and to exhibit his books, and report the financial condition of his office, to the board of county commissioners on or before the first Monday in July in each year, and shall cause the same to be published in some newspaper of his county on or before the close of the school year."

"Sec. 3020. For the time necessarily spent in the discharge of his duty he shall receive \$5 per day, and fif-

teen cents for each mile necessarily traveled. He shall, as far as practicable, render an itemized bill of his services and mileage each month or quarter to the board of county commissioners, and shall make oath that the bill is just and correct, whereupon the county commissioners shall order a warrant on the county treasurer, payable from the general county fund: provided, that the annual salary so received shall in no case exceed \$100 for each regularly organized public school in the county. The commissioners shall provide him with a suitable office at the county seat, and all necessary blank books, stationery, postage, expressage and other expenses of his office not otherwise provided for, which last-mentioned expenses shall be paid for from the county fund. And no person shall hereafter be eligible to the office of county superintendent of schools who is not a person of culture and practical experience and learning in those branches of education taught in the public schools, as provided in this act, and a person of good moral character."

The foregoing and other provisions of the statute vest in the county superintendent of schools a large discretion as to the services necessary to be performed by him in the discharge of his official duty. In regard to his compensation and traveling expenses, a proper construction of the statute is that, when he renders to the board of county commissioners an account of his services and mileage for a month or a quarter of a year, made out and verified as the law requires, he has established a *prima facie* case in his favor. No authority exists to reject any item or charge upon inspection merely, unless it clearly appears therefrom that such item is incorrect or illegal. Where a question of discretion is involved, neither the discretion of the county commissioners nor that of the court can be substituted for the discretion vested by the statute in this officer. It is only upon due proof of an abuse of his official discretion, or of errors apparent from inspection, or established by proof, that jurisdiction exists to reject items of an account so rendered.

Counsel for the board of commissioners call attention to the fact that the appellant has charged the *per diem* allowed by statute, for every secular day of the quarter ending March 31, 1886. He also lays down the proposition that it could not have been the legislative intent that this officer should receive \$5 per day for every day during his term of office, irrespective of the amount of services rendered. The argument is, if such had been the legislative intent, a stated salary, instead of a *per diem* compensation, would have been provided. There is force in this proposition and reasoning. In consequence of the unequal distribution of the population of the state throughout its several counties, more time must necessarily be devoted to the duties of this office in counties having a dense population and numerous schools than in counties sparsely settled and having few schools. These considerations were evidently before the minds of the law-makers when legislating upon this question. They probably led to the insertion of the provision concerning the compensation of such officer, that, "*for the time necessarily spent in the discharge of his duty, he shall receive \$5 per day, and fifteen cents for each mile necessarily traveled.*" Honestly observed and obeyed, this provision would graduate the compensation of all county superintendents according to the service *necessarily* rendered by each. It must be conceded, however, that the intent of the statute is not capable of strict enforcement by means of judicial proceedings. Where an officer is clothed with a general supervisory power over the entire subject-matter pertaining to his jurisdiction, and, in addition to specific duties enjoined, is required to exercise a careful supervision over the affairs committed to his trust throughout his territorial district, it is only upon clear proof of bad faith or of an abuse of discretion that his official acts can be ignored or rejected as having been performed without authority of law. Courts are not disposed to interfere with the exercise of mere discretionary authority. Every reasonable intendment is to be

made in favor of the acts of public officers, who are sworn to perform their official duties correctly, so long as they appear to be acting in good faith, with due care and discretion, and within the limit of their conceded powers. 7 Bac. Abr. 313; Sedg. St. & Const. Law, 329.

In the present case the officer is authorized and required by the statute to see that all the provisions of the school law are observed and followed by teachers and school officers. He is likewise required to exercise a careful supervision over the schools of his county. These are discretionary powers, and can neither be abridged nor controlled by either the county commissioners or the courts. While honestly administering the affairs of his office, his discretion and judgment must determine the services necessary to be rendered in furtherance of the interests of the schools of his county, and not the discretion or judgment of the county commissioners or the courts. Appellee's counsel thinks this construction of the statute opens the door for the perpetration of frauds by school superintendents upon the people. It is a sufficient answer to this suggestion to say that proof of fraud, in connection with any official acts of the superintendent, will operate to nullify his discretionary powers *pro tanto*, and to invest the tribunals mentioned with jurisdiction over such acts. This is also true as to charges for services rendered outside of his jurisdiction, and to mistakes and errors committed by him.

The foregoing principles determine most of the questions raised by this appeal. The account forming the subject-matter of the litigation is made up of charges for the performance of duties specifically enjoined by the statute, and charges for services rendered by the appellant in the exercise of his discretionary authority. We find no evidence of bad faith, of any attempt to commit frauds, or of any abuse of discretion. Among the rejected items of his account are charges for official correspondence with teachers, school officers, and others, all

pertaining to school affairs. These services constitute legitimate office work, and entitle the appellant to compensation therefor. This mode of transacting business affairs is employed, to some extent, in nearly if not all the departments of business, and we perceive no reason why it should not be as efficient in the administration of school affairs as in other departments of business.

The superintendent, as a witness on the trial below, testified to his good faith in rendering these services, and in charging his *per diem* therefor; that the whole business thus transacted justified the aggregate *per diem* charges included in the account rendered; that he never tried to make the work cover more time than was necessary for its transaction; that the average number of letters necessary to be written per day was from three to four, and his practice was to make no *per diem* charge for official correspondence unless it occupied at least one hour of his time. No separate charge was made for these services when there were other duties to perform.

In this connection counsel for the appellee asks for an opinion "as to what length of time will constitute a day's service for the superintendent." We answer, the law does not recognize fractions of days; and, when it provides a *per diem* compensation for the time necessarily devoted to the duties of an office, the officer is entitled to this daily compensation for each day on which it becomes necessary for him to perform any substantial official service, if he does perform the same, regardless of the time occupied in its performance. /An effort to stretch out the officer's official work from day to day, in order to charge for a greater number of days than was necessary, appears from the testimony not to have been done in any instance in the present case.

Another question submitted in the same paragraph is, Has the superintendent the right to hold an examination of teachers on other and different days than the days specified in the statute? Can he continue the examina-

tion *ad libitum*? One of the specific duties prescribed by the statute is that the superintendent shall meet all persons desirous of passing examinations as teachers on the last Friday of February, May, August and November in each year, and examine them as to their qualifications to teach. If these examinations cannot be completed on the days named in the statute, there exists no legal objection to their completion on other days. The law would not sanction the continuance of such examinations longer than is reasonably necessary for their completion; but the superintendent is vested with authority, outside of this particular section of the statute, to examine a teacher as to qualifications whenever such service becomes necessary.

Another rejected item was the charge made by the superintendent for examining into the complaint of Rogers, that the teacher of school district No. 7 would not allow his children to attend school, and for putting the matter in the way of a speedy settlement. The objection made was that it was a matter for the board of directors to act upon in the first instance. No objections appear to have been made by the parties, or by the school board, to the action taken by the superintendent; and, his action appearing to have been efficient in the settlement of the difficulty, we think the charge correct.

In regard to the items of January 6th and March 4th (visits to the state superintendent at Denver and mileage), we are of the opinion that the first item should have been allowed. The statute requires the county superintendent "*to obey the legal instructions of the state superintendent.*" The business requiring this consultation appears to have related to some difficulty which had arisen about a joint school district, lying partly in Jefferson county and partly in Park county. A personal interview with the state superintendent appears from the testimony to have been necessary to the adjustment of the affairs of this joint district. The appellant, therefore, was entitled to recover

both his *per diem* and mileage. Concerning the trip to Denver on March 4th, for school supplies, a different ruling must be made, for the reason that the testimony of the appellant, when sworn as a witness in his own behalf, showed the trip to Denver to have been unnecessary. Outside of this item his *per diem* charge was correct, however, for he testifies to the performance of six hours of other official work on the same day. But the traveling expenses were, for the reasons given, an erroneous charge.

Concerning the manner of keeping his accounts, the statute itself is sufficiently specific, and should be obeyed. The statute requires the superintendent, *as far as practicable*, to render an itemized account of his services. His accounts should therefore be kept in such a manner that the officer may not only be able to itemize his accounts as required, but to explain them as well, if called upon to do so. The account presented in the present instance is faulty in some particulars, but, considered in connection with appellant's testimony, is deemed sufficient.

For the reasons given, we are of opinion that the judgment of the district court should be reversed, which is accordingly done. Judgment reversed, and the cause remanded.

Reversed.

UNION IRON WORKS v. BASSICK MINING COMPANY ET AL.

1. A purchaser at a sheriff's sale, as well as a party redeeming, is bound at his peril to inquire whether it sufficiently appears on the face of the record that the court had jurisdiction.
2. It is true that courts of equity interfere not only to remove, but to prevent, a cloud upon title, but it is a general rule that the enforcement of a legal right will not be enjoined in equity except upon a clear showing of a right superior to that which it is sought to enjoin.

3. The rule is that a sale of real estate under legal process will not be enjoined because of irregularities in the proceedings, or because the judgment upon which process issued was void, where no serious injury or embarrassment to title is shown as likely to result from allowing the sale to proceed.

Appeal from District Court, Custer County.

COMPLAINT filed June 9, 1886, as follows:

“The plaintiff, complaining of the defendants, alleges:

“(1) That it is a body corporate organized and doing business under and by virtue of the laws of the state of California, and was such corporation at and during all of the times hereinafter mentioned.

“(2) That the defendant, the Bassick Mining Company, is a corporation organized under the laws of the state of New York, and authorized, by a compliance with the terms and conditions of the laws of the state of Colorado, to do business in said last-mentioned state.

“(3) That, at and before the times hereinafter mentioned, the said defendant company was indebted to the plaintiff in a large sum of money, to wit, the sum of sixteen thousand three hundred and eighty-five dollars (\$16,385), with interest upon the same according to the terms of such indebtedness then existing, and, being so indebted, the plaintiff, on, to wit, the 16th day of June, 1885, began its action in the district court of the second judicial district of the state of Colorado, in and for the county Arapahoe, in attachment against the said defendant, the Bassick Mining Company, and upon the filing of its bond, as required by the statute in such case made and provided, a writ of attachment issued against the said defendant company out of and under the seal of said court.

“(4) That on, to wit, the 17th day of June, 1885, the summons in said cause was duly served upon said defendant company, by delivering a true copy thereof to its agent for that purpose appointed; and on, to wit, the

18th day of June, 1885, the said writ of attachment was served by levying upon the following described property, to wit [description of property].

“(5) That afterwards and on, to wit, the 15th day of August, 1885, the said defendant company having wholly failed to answer, and having permitted the said cause to go by default, judgment was duly entered against it in favor of this plaintiff for the sum of sixteen thousand seven hundred and ninety-five dollars and fifty-eight cents (\$16,795.58) together with the costs of said case, amounting to twenty-seven dollars and forty-five cents (\$27.45), and execution, both general and special, ordered against said defendant company and against the property attached.

“(6) That, before the rendition of said judgment, divers other attachments had been, at the instance of divers other creditors, sued out and levied upon the identical property so aforesaid attached by this plaintiff, a large number of which attachments were prior in date to the said attachment of this plaintiff, and some of which, having been brought in other courts and in vacation, were prior in time and senior to the attachment of said plaintiff; the first of said writs of attachment having been issued in behalf of the Hendrie & Bolthoff Manufacturing Company out of and under the seal of the said court, and levied upon the said identical property on, to wit, the 28th day of May, 1885, and in which said cause a judgment was entered against the said defendant company for the sum of seven thousand forty-two dollars and seventy-nine cents (\$7,042.79), said judgment having been rendered on the 29th day of July, 1885; and divers other judgments against the said defendant company were entered at the suit of divers other creditors, both in said court and in the district court in and for the said county of Custer.

“(7) That execution having been issued in said cause of the said Hendrie & Bolthoff Manufacturing Company

upon the personal property attached and levied upon by this plaintiff, as well as by the said company, the same was sold under said execution as of a prior lien, and the proceeds thereof devoted to the payment *pro tanto* of said judgment, and in consequence thereof no execution has been or could be levied upon said property in this cause; leaving the real estate hereinbefore described alone to satisfy the judgment of this plaintiff, and such other judgments and claims and levies as have been obtained and acquired against the said premises.

“(8) That afterwards, and on the 12th day of January, 1886, an execution in said cause was issued to the sheriff of the said county of Custer for service, and returned as against the said property of the said defendant company, which had, as will hereafter more fully appear, been sold under certain other executions issued in certain other cases upon judgments therein obtained, by means whereof this plaintiff has failed to realize any part or portion whatsoever of the amount of its said judgment against the said defendant, the Bassick Mining Company, up to and including the day hereof.

“(9) The plaintiff further alleges that, on or about the 1st day of June, 1885, one William D. Schoolfield, who is made a party defendant to this suit, commenced a certain action in the district court in and for the county of Custer aforesaid, against the said defendant, the Bassick Mining Company, Fred McKeon, M. D. Swisher, M. M. St. Clair, Julia E. Hamlin, the Laflin & Rand Powder Company, Frazer & Chalmers, and the Hendrie & Bolthoff Manufacturing Company, to enforce a lien upon and against the property hereinbefore mentioned as having been attached at the instance of this plaintiff, together with all and singular the improvements thereon; that afterwards, and about the 19th day of June, 1885, the said action was dismissed as to the said Hendrie & Bolthoff Manufacturing Company, Fred McKeon, M. D. Swisher, William

Houze, M. M. St. Clair, Julia E. Hamlin, the Laflin & Rand Powder Company and Frazer & Chalmers.

“(10) That in said action, brought by the said Schoolfield, H. T. Holthoff, John H. Templeman and John Jordi intervened as lien claimants against the said defendant, the Bassick Mining Company, and against the said property hereinabove described.

“(11) That on or about the 11th day of June, 1885, one Thomas Armstrong was, by order of said court duly made, allowed to intervene in said action, and did so intervene, and filed his petition, claiming a miner's lien upon the said Maine lode only, and upon such buildings and permanent improvements and appurtenances as belonged thereto for and on account of work done and performed in and about said Maine lode within the months of March, April, May and June of said years, by himself and certain persons who had assigned their respective claims and liens therefor to him for purposes of enforcement, amounting to the sum of twenty-one thousand eight hundred and forty-seven dollars and eighty-five cents (\$21,847.85).

“(12) That said petition of said Armstrong, among other things, set forth and alleged that the above said work and labor was done and performed by said persons in the working and development of said Maine lode, and the said Armstrong in no wise or manner whatsoever claimed, or attempted to claim or demand, a lien on any of the other of the said premises of the said defendant company.

“(13) And afterwards, and on the 19th day of June, 1885, in said action so brought by the said Schoolfield, the said court entered its decree, which said decree, after reciting that the cause coming on to be heard upon the complaint, the answer and the cross-bill of the defendant B. C. Adams, the intervening petition of H. C. Holthoff, John H. Templeman, Thomas Armstrong and John

Jordi, and the default of the Bassick Mining Company to answer, and the report of the referees theretofore appointed, orders that said plaintiff, Schoolfield, have a lien and judgment upon the property of the said company, described in his complaint, for six thousand ninety-three dollars and nine cents (\$6,093.09), and costs; that said defendant, B. C. Adams, have a lien and judgment upon the property of the said defendant, Bassick Mining Company, as asked for in his said complaint, for two thousand three hundred and twenty-one dollars and fifty cents (\$2,321.50), and costs; that the intervening petitioner John Jordi have a lien and judgment upon the property of said company, as asked for in his said petition, for two hundred and sixty-two dollars and fifty cents (\$262.50), and costs; that the intervening petitioner Thomas Armstrong have and recover of and from the said defendant company the sum of twenty-one thousand two hundred and twenty-five dollars and ninety cents (\$21,225.90), and that he have a lien upon the property of the said defendant, the Bassick Mining Company, therefore, as asked for in his said intervening petition, and his costs to be taxed; that the intervening petitioner Templeman have a lien and judgment upon the property of the said mining company, as asked for in his petition, for seven hundred and ninety-seven dollars and fifty cents (\$797.50); that the intervening petitioner Holthoff have a lien and judgment upon the property of the said defendant company, as asked for in his said intervening petition, for four thousand two hundred and twenty-one dollars and twenty-six cents (\$4,221.26), as asked for in his said petition. The said decree further orders that all property mentioned or described in the petition of said Schoolfield, being the said property so as aforesaid attached by this plaintiff, be sold by the sheriff of the said Custer county, on the terms and conditions as a sheriff is directed by the law to sell real estate on execution; and after having given notice as required by law for the sale

of real estate on execution for cash in hand to the highest and best bidder, selling said property in separate parcels or altogether, as would bring the most money; that the said sheriff was thereupon then ordered to appropriate the proceeds of said sale — *First*, to the payment of the costs of said suit, and of the receiver who had been appointed thereunder; *second*, to the payment *pro rata* of all and singular the several liens and judgments therein decreed, and, in case the said judgments should not be satisfied in full, then that all parties, claimants thereunder, should have execution for the balance remaining unpaid.

“(14) That the said defendant company in said decree was not given any time whatsoever for the payment of the said decree, or any part thereof, prior to the issuance of execution thereunder, and that it was provided that such executions should issue at once and without delay.

“(15) Plaintiff further alleges, upon information and belief, and so charges the fact to be, that the said property of the said defendant company, mentioned in said decree, was and is of great value, to wit, of the value of not less than one hundred and fifty thousand dollars (\$150,000), and that the said Maine lode is the main or principal lode of the said defendant company, the other lodes, however, being also of great value; that the mill of the said defendant company, which plaintiff is informed and believes is of a value of not less than twenty-five thousand dollars (\$25,000), is not upon said Maine lode at all, but upon one of the other properties mentioned in said decree.

“(16) Plaintiff further alleges, upon information and belief, that the said parties to the said action at the time the said action was brought by the said Schoolfield, and in whose favor the several liens were allowed, were in collusion with each other, and caused the published notice of the sale under said decree to be commenced on the 18th day of June, 1885, one day before the said decree

was signed by the said court; that said notice was given in the Rosita Index, a paper published in Rosita, in said Custer county, which said paper is a weekly paper, and the issue thereof for said week in which said notice first appeared was published on Thursday, the 18th day of June, 1885; that said paper is published and issued on Thursday of each week; that the first issue thereof made after the signing of said decree was made on Thursday, the 25th day of June, 1885; that the sale of the property under said decree of said court was made by the sheriff of said county on the 11th day of July, 1885, sixteen days after the said 25th day of June, 1885, which said June 25 was the first possible date that public notice thereof, under said decree, could have been given through said paper, and that no other notice of sale than the said notice in said paper, commenced on June 18, 1885, was given of said sale of said premises under said decree.

“(17) That afterwards, and on the 11th day of July, 1885, pursuant to the said notice so as aforesaid given, the said sheriff sold said premises described in said decree, being the identical property hereinbefore described, to satisfy said liens and judgments in said decree mentioned; that said property was not sold separately, but, on the contrary, all of said property was sold *en masse*, and the same realized at the said sale, above expenses, the sum of thirty-eight thousand dollars (\$38,000), or thereabouts.

“(18) That the said premises were sold as aforesaid, as well upon the decree in behalf of said Armstrong as upon the decree in behalf of the other lien claimants, and all of said property was sold as much under the said decree of the said Armstrong as of the other said lien claimants, notwithstanding that the said Armstrong claimed no lien whatsoever upon any of said premises save and excepting the said Maine lode mining claim. And the plaintiff avers that by reason of the said advertisement and manner of said sale, and by reason of the making of the de-

cree as aforesaid, the plaintiff has been advised that the said sale is probably null, and, if so, that no rights can be acquired by redemption creditors thereunder.

“(19) Plaintiff further alleges that the sale has at no time been affirmed by the said court, or the judge thereof, and that on or about the 11th day of January, 1886, the time for the redemption of said premises from said sale by the said defendant company expired and ceased by limitation.

“(20) That on or about the 12th day of January, 1886, the said Hendrie & Bolthoff Manufacturing Company caused to be issued out of the said district court of Arapahoe county an execution in due form, directed to the sheriff of Custer county, for service and return, and accompanied the same with funds to redeem the said premises under the said sale made in virtue of said decree; but having been advised that by reason of the said irregularity of said decree, and the sale thereunder, the same was not by the said Hendrie & Bolthoff Manufacturing Company redeemed.

“(21) The plaintiff, further complaining, alleges that the said defendant Bassick is one of the directors of the said defendant company, and that he, together with the defendants White, Staples and others, as plaintiff is informed and believes, has entered into a combination and conspiracy with themselves to have the property in said decree mentioned realize as small a sum as possible, that they might buy in the same for their own use and benefit, and thereby deprive, defeat, cheat, swindle and defraud the creditors of said defendant company out of their just debts and demands; that said White, as the assignee of a judgment of one A. Vorreiter against the said Bassick Mining Company in the district court in and for said Custer county, for the sum of three thousand one hundred and fifty-two dollars and fifty-seven cents (\$3,152.57) debt, and the further sum of twenty-two dollars and sixty cents costs, with interest thereon from the

date of the said judgment, on which said judgment is a credit of three hundred and sixty-one dollars and eighty-three cents (\$361.83), subsequent to the expiration of six months' time of redemption given said company from said sale, and during the month of January, 1886, sued out an execution on said judgment last aforesaid, and placed the same in the hands of the sheriff of said Custer county to execute; that said sheriff, the defendant Hunter, did indorse on the back of the said execution, issued on said judgment of said Vorreiter, a levy upon said property in said decree described; whereupon the said White paid the said sheriff the sum of \$39,523.15, being the amount of money and costs as realized on said sale of July 11, 1885, with accrued interest, to redeem the same in said decree mentioned in said action brought by said Schoolfield, W. Armstrong, and others as intervenors.

“(22) That said defendant Hunter, sheriff of said county, under and by virtue of said redemption of said White, did advertise the said property in said decree mentioned for sale to the highest and best bidder for cash on the 10th day of March, 1886; whereupon the said Hendrie & Bólthoff Manufacturing Company did file its certain complaint in said cause, upon which a writ of injunction issued, commanding the said defendant wholly to desist and refrain from making sale thereunder until the further order of the court in the premises; whereupon the said Hunter did, instead of returning the execution in his hands as by law he was required to do, with the causes of his failure to sell indorsed thereon, advertised that he would adjourn said sale to the 24th day of March, 1886, between the hours of 10 o'clock A. M. and the setting of the sun on that day. That on said day, the said injunction being still depending undetermined, the said Hunter did further postpone said sale by advertisement until the 14th day of April, 1886, and afterwards, and on the 14th day of April, 1886, the said injunction being still against the said sale, postponed the

said sale until the 6th day of May, 1886, at the hour and place specified; and afterwards, and on, to wit, the 6th day of May, 1886, advertised that he would postpone the said sale until the 13th day of May, 1886, when the same would take place at the hour and place therein specified; the last said postponement having been advertised but for the period of seven (7) days in the said Rosita Index (being but one issue of the said paper), and said advertisement having appeared only on the day of said sale, as plaintiff is informed and verily believes, which, as aforesaid, is a paper published weekly in said county and state, and a copy of which said advertisement is in words and figures following: [Here follows advertisement of sale and postponements.]

“(23) Plaintiff further alleges that the said writ of injunction having been dissolved by order of the judge of said court on, to wit, the 10th day of May, 1886, prior to the said sale, the said defendant Hunter did proceed to make sale under and by virtue of the said advertisement and judgment and executions aforesaid, and that other creditors did then and there offer and bid the sum of \$50,000 upon and for said premises, whereupon the defendant Staples, in pursuance of the said conspiracy, collusion and intention to cheat and defraud, as hereinbefore stated, did bid the sum of \$60,016.67 upon said premises; he, the said Staples, claiming by virtue of said bid to be the assignee of a judgment of Radcliff Brothers against said Bassick Mining Company upon a judgment obtained by them against the said company for the sum of \$678.70, said judgment having been obtained in the district court in and for the said county of Custer.

“(24) That immediately after the said sum of money was by the said Staples so as aforesaid bid at said sale, the said defendant sheriff, by virtue of an execution issued out of the district court of the third judicial district within and for said county in favor of said defendant Staples, as assignee of the said Radcliff Brothers, plaintiff-

iff, against the said Bassick Company, wherein and whereby he was commanded to make the said sum of \$678.70, did advertise in the said Rosita Index that he would offer and expose for sale on the 10th day of June, 1886, the said premises hereinabove described, for the purposes of making the said sum of \$678.70, and the further sum of \$60,016.70, being the said sum paid by the said Staples as aforesaid, together with interest on said sums as provided by law, said sale to take place at the front door of the court-house in said town of Rosita between the hours of 10 o'clock A. M. and the setting of the sun on the same day, and which said publication is in words and figures as follows [notice of sale].

“(25) The plaintiff further alleges that after the said sale of the 11th day of July, 1885, and after the said sale of the 13th day of May, 1886, as it is informed and believes, the said defendant, the Bassick Mining Company, sued out its certain writ of error from the supreme court in and for the said state, directed to the said district court of Custer county in the said cause, entitled ‘*W. D. Schoolfield et al., with the said Armstrong as intervenor, against the said Bassick Mining Company,*’ and did cause a transcript of the said record to be lodged in the clerk’s office of the said supreme court; and that afterwards, and to wit, on the 17th day of May, 1886, the said supreme court, having fully examined the record and assignment of errors therein, did grant a *supersedeas* as to the decree and judgment rendered in said cause upon the filing of a bond in the sum of \$70,000, which said bond has been duly signed, executed, approved and filed, and the said *supersedeas* granted.

“(26) That in and by the said writ of *supersedeas* all proceedings under the said judgment obtained in the said case of Schoolfield have been suspended by reason of the said action of the said supreme court, and the said cause is now pending in the said court on said writ of error, subject to the review of said tribunal.

“(27) The plaintiff, further complaining, alleges that it is a non-resident corporation, and that the various matters and things hereinabove set forth have only come to its knowledge within, to wit, the last twenty days, and that the facts connected with the said sale, the granting of the *supersedeas*, and the character of the said decree, and the sale thereunder in the said cause of Schoolfield, were not brought to its attention and knowledge until within, to wit, the last two or three days.

“(28) This plaintiff, further complaining, alleges that it stands ready and willing and is anxious to purchase said property at the said sale, to take place on, to wit, the 10th day of June, 1886, and that the said sum of \$62,000, or thereabouts, it has raised and collected for the purpose of making redemption therefrom, in order that it may realize the amount of its said judgment against the said defendant company, and that the said judgment cannot be realized by it against the said defendant company save by and through its purchase of the said property under the statutes of the state of Colorado as a judgment creditor; that it has no desire to obtain the said property for its own use or purposes, and that the same, according to its best knowledge, information and belief, is amply sufficient to pay all the judgments and claims of creditors against it, provided the same can be applied to that purpose.

“(29) The plaintiff, further complaining, alleges that it is advised that, inasmuch as the said supreme court has granted a *supersedeas* upon said judgment and decree in the said Schoolfield case, and inasmuch as the said judgment may be wholly reversed and declared void, for naught held, and inasmuch as the said property was originally sold pursuant to said insufficient advertisement, and *en masse* instead of separately, and inasmuch as said sale was not confirmed, and inasmuch as the said sale made on the 13th day of May, 1886, on said Vorreiter judgment, was made as aforesaid upon an advertise-

ment and notice of seven days only, it cannot pay the said sum of more than \$60,000 with complete safety to itself; but that should the said judgment be set aside, or should said Schoolfield sale be held to be irregular and of no effect, the said sum of \$60,000 so as aforesaid required to be paid might be forever lost to this plaintiff, to its great, irreparable and utter damage and ruin; and that, on the other hand, should the said sale be ratified and confirmed, and the said judgment under which the same was made be held to be valid, then in the event this plaintiff fails to pay the said sum of money, and cause said property to be then sold upon its own execution, it will forever lose its said judgment of sixteen thousand seven hundred and odd dollars, with interest thereon, to its great damage.

“(30) The plaintiff, further complaining, alleges that inasmuch as the said sale so as aforesaid advertised and published for the 10th day of June, 1886, is a sale to be made under the said execution issued on the said judgment of Radcliff Brothers, the said defendant Hunter declines to pay any attention to the *supersedeas* issued in the said Schoolfield case by the said supreme court, but has notified the plaintiff that he is advised that it is his duty, and that in consequence he will proceed, to make said sale under said execution of Radcliff Brothers in behalf of said Staples at the time and place therein mentioned, and that, in the event the sale does not realize from outside bidders any amount greater than the sum for which it is to be held, he will make a deed of conveyance to the said Staples for said premises.

“(31) That if the said property is not redeemed, and the said deed is made, it is the object and intention of the said Staples, White, Bassick and other co-conspirators to secure to themselves the said property, and to work and develop the same for their own private ends, so that all other creditors of the said defendant company, including this plaintiff, will be deprived forever there-

after of any lien against the same, or of the possibility of recovering any part or portion of their said judgment.

“(32) The plaintiff further alleges that its lien of attachment did take effect upon said premises by virtue of the levy hereinabove mentioned, and that its execution has issued within the time required by law, and that the same is ready to be delivered into the hands of the sheriff for the purpose of purchasing said premises and re-advertising the same, but that the plaintiff cannot pay the said amount of money, in view of all the facts and circumstances hereinabove narrated, without grave risk of incurring the entire loss thereof; but that, if the said premises could be again offered for sale, it would enable other creditors to come in subsequently so soon as they could be assured of the validity of the said Schoolfield decree and sale thereunder, as redemption creditors, or to make original sale of said property if the invalidity of said sale and decree should be established, by means whereof all and singular the debts of the said defendant company owing to them could be realized out of said property; and that, until the question of the validity or invalidity of said decree and sale thereunder is properly established, neither of the said defendants should be permitted to make sale of said premises, either under the executions now in the hands of the sheriff, or any executions whatever.

“(33) Plaintiff further alleges that besides its own claim there are judgment liens upon said premises, as it is informed and believes, amounting, to wit, to the sum of about \$75,000, which said sums have been wholly unsatisfied and will remain wholly unsatisfied, provided the said sale should take place on the 10th day of June aforesaid, and a deed should be made therefor, and the said Schoolfield decree should be affirmed.

“(34) Plaintiff further alleges that the said defendant, the Bassick Mining Company, is wholly and absolutely insolvent; and, beyond the said property and premises

hereinabove mentioned as about to be sold, it has no available means or assets out of or by means of which the plaintiff's said claim can be realized.

“(35) That this plaintiff is wholly without remedy save in a court of equity; and, inasmuch as it stands ready and willing to pay off all of the said sum of money mentioned in the said advertisement of sale, so soon as it can do so with safety, in order that it may realize the amount of its own legitimate claim, it respectfully prays this court that a writ of injunction issue out of and under the seal thereof, directed to the coroner of said county for service and return, and commanding the defendants, and each and all of them, wholly to desist and refrain from advertising or making sale of said premises hereinabove described, or any part or portion thereof, under the said execution issued on the said judgment of Radcliff Brothers against the said Bassick Mining Company, or under any other execution whatsoever, until the further order of this court; and that until the said decree in the said case of Schoolfield against the Bassick Mining Company be either affirmed or reversed, the said injunction order remain in full force and effect; and that, in the event the same should be reversed, the said decree of injunction be made perpetual, and that this plaintiff have such other and further relief as to equity and good conscience shall seem meet.”

On this bill of complaint a temporary injunction was issued in the court below. Subsequently this injunction was dissolved, and a decree entered dismissing the bill. From this decree the complainant appealed to the supreme court, and upon his application a temporary restraining order was issued. Further facts in the case sufficiently appear in the opinion.

Messrs. L. S. DIXON and R. D. THOMPSON, for appellant.

Messrs. HUGH BUTLER and T. D. W. YONLEY, for appellees.

ELBERT, J. The case of *Schoolfield et al. v. The Bassick Mining Company*, now pending on error in this court, was a proceeding under the mechanic's lien law, to enforce sundry liens against the property of the defendant therein. The decree was rendered in that case by the court below in favor of the several lien claimants, and a sale of the defendant company's mining property, consisting of seven or more lodes, with improvements thereon, was had under the decree. It is claimed that this decree and sale are void for reasons which will be hereafter stated. The contention here is between judgment creditors of the Bassick Mining Company, to wit, White, Staples and the Union Iron Works, the complainant herein. Each of these judgment creditors had a right, under the statute, to redeem the property sold under the decree in the Schoolfield case. White redeemed and sold the property under an execution issued on his judgment. Staples, in turn, redeemed the property, and advertised it for sale under the execution issued on his judgment. The Union Iron Works, the complainant, instead of redeeming, filed its bill in the district court of Custer county, asking that the defendant Staples be enjoined from selling the property under his execution. On this bill a temporary injunction was issued by the court below. Subsequently this injunction was dissolved, and a decree entered dismissing the bill. This is the case before us on appeal.

The leading facts as disclosed by the bill, and those upon which the equities of the complaint chiefly rest, are as follows: One Armstrong was one of several lien claimants in the Schoolfield case, and claimed and was decreed a lien on the Maine lode belonging to the defendant, the Bassick Mining Company. The other claimants in that suit claimed and were decreed liens, not only on the Maine lode, but on several other lodes, property likewise belonging to the defendant, the Bassick Mining Company. The court, notwithstanding the fact that the Armstrong

lien was decreed on the Maine lode alone, ordered and directed generally a sale of all the property to satisfy all the liens. All of the property affected by the different liens was subsequently sold under this decree *en masse*.

It is contended by counsel for complainant that this order of sale was void, and that the sale thereunder to satisfy the liens was also void. The sale was made July 11, 1885, but the complaint does not disclose who was the purchaser. This, however, is unimportant. If the sale was void, as claimed, he took no title to the property sold; that is to say, notwithstanding the sale, the title of the property remained in the judgment debtor, the Bassick Mining Company.

In January, 1886, the defendant White, as a judgment creditor of the Bassick Mining Company, caused an execution to be levied on the property in controversy, and paid the sheriff the sum of about \$39,000, that sum being the amount necessary to redeem from the sale under the Schoolfield decree. The sheriff then proceeded and advertised the sale of the property under the White execution. This sale was made May 13, 1886. Upon the proposition that the order of sale in, and the sale itself under, the Schoolfield decree was void, it is claimed that this redemption and sale by White are also void. *Freem. Ex'ns*, § 321; *Mulvey v. Carpenter*, 78 Ill. 580; *Johnson v. Baker*, 38 Ill. 98; *Keeling v. Heard*, 3 Head, 592.

The sale under the White execution was on the 13th of May, 1886. At this sale the defendant White was the highest bidder and purchaser. The allegation in the complaint that Staples was the purchaser at this sale is admittedly a mistake. Thereafter, as the owner of a judgment against the Bassick Mining Company, the defendant Staples caused an execution to be levied on the property, paid to the sheriff the sum of \$60,016 redemption money, and advertised the property for sale on the 10th day of June, 1886. It is this sale that the court below was asked to enjoin. It is claimed, for the reasons

given, that the redemption by the defendant Staples was void, and that the sale under his execution, if allowed to proceed, will likewise be void. Other questions are made respecting the regularity of the proceedings under both the White and the Staples execution, but we do not deem it necessary to notice them. Under the allegations of the bill the case of the defendants stands thus: The decree in the Schoolfield case, and the sale thereunder, the redemption by White, and the sale under his execution, were all void. The redemption by the defendant Staples was also void, and his sale, if allowed to proceed, will be of like character. The *status* of the complainant is this: On the 18th day of June, 1885, it levied its writ of attachment on the property in controversy. On the 15th day of August, 1885, it obtained judgment against the Bassick Mining Company for the sum of \$16,795.58. On the 12th day of January, 1886, it caused an execution to be issued, and afterwards, on the 9th day of June, 1886, it filed the bill we are considering.

The only question presented is, Did the court below err in dissolving the injunction and dismissing the bill?

The power of courts of equity to restrain proceedings at law is well established. The jealousy, however, with which the jurisdiction has always been regarded, has restricted it to somewhat narrow limits. Fraud, mistake, and surprise in obtaining judgments are the most common grounds on which the jurisdiction is invoked. In this case it is to be observed the grounds of complaint do not arise out of the judgment sought to be restrained, but out of matter extrinsic the judgment. The judgment of the defendant Staples is unassailed. We are asked by the complainant to enjoin the sale under it until the Schoolfield case shall be decided by the appellate court. Two principal grounds are assigned:

1. That the complainant cannot redeem on its judgment under the statute, except at the peril of losing the redemption money paid should the decree in the School-

field case be hereafter declared void by the appellate court. This is an embarrassment which arises out of the alleged void or voidable character of the Schoolfield decree, and is in nowise chargeable to the defendant Staples or his judgment. As a judgment creditor, the same risk confronted him, and he chose to take it. The complainant asks that he may be restrained until it, the complainant, may be advised by the decision of the appellate court whether or not it may safely proceed to exercise its statutory right of redemption. Whatever hardship may exist is the result of a rule of law, namely, that a purchaser at a sheriff's sale, as well as a party redeeming, is bound at his peril to inquire whether it sufficiently appears on the face of the record that the court had jurisdiction. Freem. Judgm. § 509. We do not understand that the hardship this rule of law is liable to entail is a ground for equitable relief, nor are we cited to any authority that so holds.

It is claimed, however, by the complainant:

2. That the sale under the Staples execution, if allowed to proceed, will be void, and will cast a cloud upon the title of the property to which the complainant is looking to satisfy its judgment. It is true, courts of equity interfere, not only to remove, but to prevent a cloud upon a title. High, Inj. § 147. The cases, however, illustrative of the jurisdiction, proceed upon much clearer rights and equities than any presented by the bill under consideration. A number of recognized rules interpose between the complainant and the relief it asks. "It is a general rule that the enforcement of a legal right will not be enjoined in equity except upon a clear showing of a right superior to that which it is sought to enjoin." High, Inj. § 152. The complainant and the defendant are both judgment creditors, and stand *in pari statu*. There is no superior right upon the part of the complainant. Each is at liberty, under the statute, for the purpose of satisfying his judgment, to issue an execution

and levy it upon any property or upon any interest, either legal or equitable, in any property belonging to the judgment debtor. The defendant Staples, in his levy and sale, is proceeding under the statute, not in any wanton or inequitable disregard of the rights of the complainant, but in the method prescribed by the statute, seeking satisfaction of his judgment. In this connection it is to be remembered equity will not interpose and enjoin an execution creditor, where by so doing it will destroy or imperil his rights, and prevent him from obtaining that satisfaction of his judgment to which he is both legally and equitably entitled. Freem. Ex'ns, § 440. It is true that questions may arise as to the regularity of proceedings under the execution, and the soundness of the defendant's title, should the proposed sale proceed; but this is matter of dispute.

It is contended upon the part of counsel for defendants that the Schoolfield decree, and the proceedings thereunder, as well as the proceedings under the White and Staples execution, are not void; that, if irregular, they are voidable only. The different legal results, as respects the rights of purchasers and judgment creditors redeeming, flowing from these two different positions of the contending parties, are well understood and need not be stated. Freem. Ex'ns, §§ 339-345. If the position of defendant's counsel be correct, then, instead of clouding the title, the sale of the defendant Staples will pass the title.

The question is presented, should the court below have gone into the questions raised touching the void or voidable character of the Schoolfield decree, and of the proceedings thereunder, especially while it was pending on error in the appellate court, and likewise into the questions raised touching the void or voidable character of the proceedings under the White and Staples executions? We are not prepared to admit, nor do we know of any authority for the broad proposition, "that the complain-

ant has a right in equity to have the regularity of former sales determined in advance of its redemption." In such matters it is for judgment creditors to proceed as they shall be advised. We do not understand it to be the practice of courts of equity, upon a bill of this nature, to pass upon a question of title in advance of its acquisition by either the defendant or complainant. The rule is that, "in general, questions of title being properly triable at law, equity will not interfere to restrain a sale of real estate under execution, the title to which is in dispute; but will leave the parties to pursue their remedy in a legal form." High, Inj. § 152. So, too, it is to be observed that had the court gone into the questions raised, and held the several sales void, an injunction would not have issued as of course. The rule is that a sale of real estate under legal process will not be enjoined because of irregularities in the proceedings, or because the judgment on which process issued was "void, where no serious injury or embarrassment to title is shown as likely to result from allowing the sale to proceed." High, Inj. § 248. It may well be doubted whether the injury suggested by the complainant in this case, viz., "the depreciation of the value of the property by reason of the cloud cast by a void sale," is not too remote and speculative to justify the restraint of the defendant in the exercise of his statutory rights, even if the other objections which we have given to the exercise of equity jurisdiction did not obtain.

For the foregoing reasons, we are of the opinion that the complainant does not show any such equity as entitles him to the relief prayed, and that the court below did not err in refusing to entertain the bill. The temporary restraining order heretofore issued must be dissolved, and the judgment of the court below affirmed.

Affirmed.

10	46
10	40
10	46
15	380
10	46
25	451
10	46
128	380

BASSICK MINING COMPANY v. SCHOOLFIELD ET AL.

1. Jurisdiction in the court is power to hear and determine the particular case involved. If this power to hear and determine the particular case does not exist in the court in point of law, then there can be no jurisdiction in the case. If it does exist, then, to confer actual jurisdiction of the particular case, or subject-matter thereof, the jurisdictional power of the court must be invoked by such measures and in such manner as is required by the local law of the tribunal. Where this is done, it is then *coram judice*; if not done, there is at least error, if not want of validity, in the proceedings.
2. Under the statute (sec. 2155, Liens), judgment is to be rendered *according to the rights of the parties*, and each party is to have a lien established and determined upon the property to which his lien shall have attached.
3. In an action to enforce a mechanic's lien on defendant's entire property, in which several intervenors also claimed liens upon the entire property, and one upon a portion only of the property, a decree was made establishing liens in favor of the different parties in accordance with their respective claims. *Held*, that an order of sale of the entire property, directing *pro rata* distribution of the proceeds among all said lienholders, was unauthorized and void.

Error to District Court, Custer County.

THIS action was brought by Schoolfield to enforce a mechanic's lien against the Bassick Mining Company, Adams, and others. Adams filed an answer and cross-complaint in the suit, claiming a lien upon all the premises in the plaintiff's complaint. Templeman, Holthoff, Jordi and Armstrong were intervening petitioners. The several cases were tried and determined as one suit, under the statute. The court entered the following decree:

"Now, this cause coming on to be heard on the complaint, the answer and cross-bill of the defendant B. C. Adams, the intervening petitions of H. C. Holthoff, John H. Templeman, Thomas Armstrong and John Jordi, and the default of the defendant the Bassick Mining Company to answer, and the report of the referees heretofore appointed herein, and all matters and things having been heard and fully considered by the court, and the

court being fully advised in the premises, it is ordered, adjudged and decreed that the said plaintiff have and recover of and from the said defendant the Bassick Mining Company the sum of \$6,093.09, and that he have a lien on the said property of the said Bassick Mining Company, as prayed for in his said complaint, and his costs to be taxed; that the said defendant the said B. C. Adams have and recover of and from the said defendant the Bassick Mining Company the sum of \$2,321.52, and that he have a lien therefor on the property of said Bassick Mining Company, as asked for in his said cross-complaint, and his costs to be taxed; that the intervening petitioner John Jordi have and recover of and from the defendant the Bassick Mining Company the sum of \$262.50, and that he have a lien on the property of said mining company, as asked for in his said petition, and his costs to be taxed; that the intervening petitioner Thomas Armstrong have and recover of and from the defendant the Bassick Mining Company the sum of twenty-one thousand two hundred and twenty-five dollars (\$21,225) and ninety-three cents, and that he have a lien on the property of the said the Bassick Mining Company therefor, as asked for in his said intervening petition, and his costs to be taxed; that the intervening petitioner John H. Templeman have and recover of and from the defendant the Bassick Mining Company the sum of seven hundred and ninety-seven (797) dollars and fifty cents, and that he have a lien on the property of the said the Bassick Mining Company therefor, as asked for in his said intervening petition, and his costs to be taxed; that the intervening petitioner H. C. Holthoff have and recover of and from the defendant the Bassick Mining Company the sum of four thousand and two hundred and twenty-one (4,221) dollars and twenty-six cents, and that he have a lien upon the property of the said the Bassick Mining Company, as asked in his said intervening petition, and his costs to be taxed.

“It is further ordered, adjudged and decreed, that the

said property of the said defendant the Bassick Mining Company, to wit: The Maine lode and mill-site, being mineral certificate number twenty-nine (29), designated by the surveyor-general as lots Nos. 59 A and 59 B, recorded in Book 27, pages 112, 113, 114, 115 and 116, of the Custer county, state of Colorado, records; also the Triangle lode, being mineral certificate No. 92, designated by the surveyor-general as No. 181, recorded in Book 41, at pages 1, 2, 3 and 4, of the said Custer county records; also the Spring lode, being mineral entry No. 94, designated by the surveyor-general as lot No. 182, recorded in Book 41, at pages 5, 6, 7 and 8, of the said Custer county records; also the Frank lode, being mineral certificate No. 93, designated by the surveyor-general as lot No. 192, recorded in Book 41, at pages 9, 10, 11 and 12, of the records of said Custer county; also the Georgie lode and Lookout mill-site, being mineral entry No. 95, and designated by the surveyor-general as lots Nos. 193 A and 193 B, recorded in Book 41, at pages 13, 14, 15 and 16, of the records of said Custer county; also a three-quarters interest in the Nemeha lode, being mineral certificate No. 34, designated as lot 64, recorded in Book 21, pages 464, 465 and 466, of the records of said Custer county; also the Lookout lode, being mineral certificate No. 28, designated as lot 58, recorded in Book 21, at pages 565, 566, 567 and 568, of the records of said Custer county,—together with all the buildings, machinery and improvements thereon situate, and the privileges and appurtenances thereunto belonging, all in Hardscrabble mining district, in the said county of Custer and state of Colorado, be sold by the sheriff of said Custer county on the same terms and conditions as the sheriff is directed by the law to sell real estate on execution; and, after having given notice as required by law for the sale of real estate on execution, for cash in hand, to the highest and best bidder, selling said property in separate parcels or all together, as will bring the most money.

“It is further ordered that the said sheriff shall appro-

priate the proceeds of said sale as follows: (1) To the payment of all the costs of this proceeding, including whatever balance may be due the receiver, James W. Kurtz, for the care and preservation of the said property up to and including the day of sale; (2) to the payment of the several liens herein declared, and the judgments herein decreed, in full, if there shall be a sufficiency to pay the same; but if there shall not be a sufficiency to pay the same, then payments on said judgments to be made *pro rata*. And in case said judgments shall not be paid in full, each and all the parties, claimants therein, shall have execution for the balance remaining unpaid."

The defendant the Bassick Mining Company brings the cause to the supreme court by writ of error. The further facts in the case sufficiently appear in the opinion of the court.

Messrs. PATTERSON and THOMAS, for plaintiff in error.

No appearance for defendants in error.

ELBERT, J. The petition of Schoolfield claimed a lien upon all the property of the defendant the Bassick Mining Company. The defendant Adams filed his answer and cross-bill, claiming a lien upon all the property. Templeman, Holthoff and Jordi successively filed their respective petitions as intervenors, also claiming on all the property. Subsequently Armstrong filed his petition as an intervenor, claiming a lien upon a *part* of the property only, viz., the Maine lode. The liens decreed the several lien claimants, with the exception of Armstrong, were upon all the property of the defendant, consisting of seven or more lodes, and the improvements thereon, including the Maine lode. The lien decreed the complainant Armstrong was upon the Maine lode *only*.

The leading error assigned, and the only one argued by counsel for plaintiff in error, goes, not to the decree proper, establishing and decreeing the liens of the several

parties to the proceeding, but to the order of sale embodied in the decree and made a part of it. It will be seen, upon examination, that the order of sale is general; that is to say, to sell all the property to satisfy all the lien claimants, without reference to the fact that the lien claimed by and decreed to Armstrong was *on the Maine lode only*. The office of an order of sale is to enforce and make productive the decree. It is based upon the decree and should be warranted by it. Had Armstrong been the only lien claimant, and his petition the only petition before the court for consideration, it is entirely plain that, while the court had jurisdiction of the subject-matter of the petition, it had no power or authority to order a sale of property other than that mentioned in the petition, and upon which a lien had been decreed. Its jurisdiction was not invoked with respect to a claim of lien upon any other property, nor could it attach to any other property than that mentioned in the petition. "Jurisdiction in the court is power to hear and determine the particular case involved. If this power to hear and determine the particular case does not exist in the court in point of law, then there can be no jurisdiction in the case. If it does exist, then, to confer actual jurisdiction of the particular case, or subject-matter thereof, the jurisdictional power of the court must be invoked or brought into action by such measures and in such manner as is required by the local law of the tribunal. When this is done, it is then *coram judice*. If this be not done, there is at least error, if not want of validity, in the proceedings. * * * The power of the court, as we have seen, over the property or subject-matter referred to in the proceedings, must be invoked over the particular case by a petition good upon demurrer; and so it must by personal notice or service, where, by statute, the latter is essential to confer jurisdiction. * * * The action of the court and notice of sale, as also the sale itself, must be of and concerning the same subject-matter described in the petition. If the

want of such conformity appears,—as if the petition be in reference to one tract of land, and the decree, sale or notice of sale be of another and different one,—then no title will pass by the sale. The proceedings, so far as the sale is concerned, will be a nullity. In *Frazier v. Steenrod*, 7 Iowa, 338, the order of sale and the notice of sale were for entirely different tracts of land, and the court held the sale void, although the sale was of the tract described in the order, and the sale and deed had been approved by the probate court.” Ror. Jud. Sales, §§ 70, 73, 74, cases cited; Freem. Judgm. §§ 116 *et seq.*, 143; *Rhode Island v. Massachusetts*, 12 Pet. 718; *U. S. v. Arredondo*, 6 Pet. 710; *Frazier v. Steenrod*, 7 Iowa, 340; *Fithian v. Monks*, 43 Mo. 502; *Wood v. Stanbery*, 21 Ohio St. 142.

We think it equally plain that the defect of jurisdiction which we have pointed out was not cured by the fact that the jurisdiction of the court had attached to all the property under and by virtue of the petitions of the other lien claimants. Their petitions did not invoke the jurisdiction of the court in respect to the Armstrong claim. We do not see that the court had any greater or different jurisdiction than if the subject-matter of each petition had been tried and adjudicated separately. The same fundamental principles fix the limits of the power and authority of the court in the one case as in the other. *Curtis v. Leavitt*, 15 N. Y. 116.

Counsel contend that, considered as one suit, there was jurisdiction of the subject-matter, and that the order of sale is therefore not void, though irregular. Subject-matter is that which is offered for judicial decision. The subject-matter of the Armstrong petition was not the Maine lode, but his claim of lien upon the Maine lode. The subject-matter of the petitions of the other lien claimants was not the property mentioned in their petitions, but their claims of lien upon the property mentioned. Counsel, therefore, assume that which is contested when they say the court had jurisdiction of the

subject-matter. The question is whether, *on the case before the court*, the action of the court was judicial or extrajudicial,—with or without authority of law. Cases cited *supra*. A claim of lien by Armstrong upon all the property of the defendant company was not a matter presented by any petition before the court. It was not, therefore, and could not be, the subject of order or decree. Had such a lien been decreed, it would have been void. *A fortiori* the order of sale is void.

Section 2155 of the General Statutes is as follows: “The court may proceed to hear and determine said liens and claims, or may refer the same to a referee to ascertain and report upon said liens and claims, and the amount justly due thereon. Judgment shall be rendered according to the rights of the parties. The various rights of all the lien claimants, and other parties in any such action, shall be determined and incorporated in one judgment or decree. Each party who shall establish his claim under this act shall have a judgment against the party personally liable to him for the full amount of his claim so established, and shall have a lien established and determined in said decree upon the property to which his lien shall have attached, to the extent hereinbefore stated.” By this section “judgment is to be rendered *according to the rights of the parties*,” and each party is to have a lien established and determined in said decree, “*upon the property to which his lien shall have attached*.” The succeeding section provides that the court shall cause *said property* to be sold in satisfaction of said lien and costs of suit, as in case of foreclosure of mortgages.

For the reasons given we think the order of sale was not only irregular, but beyond the power and authority of the court, and void. To this extent the decree of the court below is reversed, and the cause remanded. As we are advised that there has been a sale under the decree, we are in doubt as to the present *status* of the case in the court below.

If the liens have been satisfied, the purchaser at the sale, or those redeeming from him, may wish to be heard touching their right to be subrogated to the rights of the lien claimants whose claims they have paid. Freem. Ex'ns, § 352; *Valle's Heirs v. Fleming's Heirs*, 29 Mo. 152; 77 Am. Dec. 557.

We therefore remand the case without direction, with a view of allowing all parties interested an opportunity to be heard.

Remanded.

PEOPLE EX REL. DOWNER V. ANNIS.

Under the constitution the office of district attorney must be filled either by election or by appointment. Such officer is also required to be a resident of the district in which he is elected or appointed. However, if the legislature, acting under authority expressly conferred by the constitution, transfers the county in which he resides to another district, he does not become the prosecuting officer of the latter district.

ORIGINAL case in the nature of *quo warranto*.

Downer was elected district attorney of the first judicial district. At the time of his election his residence was, and ever since has been, in Boulder county, which then constituted a part of said district. Thereafter the legislature created the eighth judicial district by taking Boulder county from the first, and uniting it with certain other counties from the second, and certain new counties created at the same session of the legislature. The governor appointed a district judge for the eighth district, who in turn appointed and commissioned respondent, Annis, to act as district attorney of said eighth district until the first succeeding general election. Annis thereupon filed his bond, took the oath of office, and entered upon the discharge of his duties. These matters are brought before the supreme court upon an agreed state-

ment of facts, for the purpose of having that tribunal determine which of the parties named is entitled to hold the office in controversy.

ALVIN MARSH, Attorney-General, for relator.

Mr. FRANK J. ANNIS, respondent, *pro se*.

HELM, J. Relator's argument in support of his right to the office in dispute rests upon two premises: *First*, that, by the act of 1887, the seven judicial districts theretofore existing were obliterated,—the entire state became a body of territory wholly without judicial district organization, and was then carved up into nine *new* districts; and, *second*, that the legislature was powerless to deprive him of his office. Both of these premises are open to serious question; but, if (for the purposes of this case only) we accept them as correct, relator's conclusion that he became district attorney of the eighth district does not follow.

At the time of his election to the office of district attorney there was no eighth judicial district in the state. The voters of the first district, which included Boulder county, where he resided, made him the prosecuting officer of that district. Under the act of 1887, the identity of the first district remains unchanged. It retains its original number, and three of the most important of its original counties. In our judgment, the detaching of Boulder, Grand and Routt, and placing them in other districts, did not destroy this identity. But, were we to concede that it did, relator's claim would not be strengthened; for he could not (nor does he) contend that the *eighth* district, consisting of Boulder and four other counties which were not previously included in the first, is in any sense, or for any purpose, to be regarded as the old first district.

There are but two constitutional ways of filling the office of district attorney, viz., by election and appoint-

ment. Relator has never been either elected or appointed to this office in the eighth district. If, under the constitution and statute, he remains in office at all, it must be as attorney for the first district. As shown, the old first and the new eighth districts cannot be considered identical; and, while we do not say that relator was legislated out of the office to which he was constitutionally elected, we certainly cannot hold that he was legislated into a new and different office. True, the district attorney must, by virtue of a constitutional mandate, be a resident of the district in which he is elected or appointed; but where the legislature, acting under authority expressly conferred by the constitution, transfers the county of his residence to another district, it does not follow that he thereby becomes the prosecuting officer of the latter district.

Relator's contention, if allowed, might lead to serious and perplexing embarrassment. Supposing the county of his residence had been, by the act of 1887, transferred to an existing district that already had its prosecuting attorney; or supposing a new district had been created by uniting two counties from different districts in which the respective district attorneys resided,—under relator's view, by what rule or principle could the courts be guided in adjudicating between the two contestants for the office in controversy?

Relator cannot successfully dispute the title of respondent, who was appointed district attorney of the eighth district by the judge of that district, and who, having duly qualified, is discharging the duties of the position.

The interrogatory propounded in the agreed statement must be answered in favor of respondent. Judgment that he is entitled to hold the office in question will be accordingly entered.

DENVER & R. G. R'y Co. v. NEIS.

1. An unlimited appearance by counsel for defendant in the county court, after appeal from a justice, announcing himself ready for trial, waiving a jury, and permitting a witness to be sworn before calling attention to his motion to quash the service of process, is a waiver of any objection under the motion. And the truthfulness of the record in this court showing these facts cannot be contradicted.
2. A witness may testify to so much of a conversation between the parties as he may have overheard, the testimony being otherwise competent.
3. Where the judgment includes compensation to which plaintiff is not entitled, it must be reversed.

Appeal from the County Court, Summit County.

THIS action was brought to recover upon an account for services rendered by plaintiff, Neis, as blacksmith. Reaugh was resident engineer of the defendant company, with entire control of its construction and business at the point where plaintiff claims to have done the work in question. Neis, who was a local blacksmith living at Recen, a place in the vicinity, was at first authorized by Reaugh to do blacksmithing when requested by the "bosses" or other employees of the company. But about August 1st a written notice from Reaugh was served upon him, directing him to do no further work at the company's expense save upon written orders of himself (Reaugh) or McHarg (his clerk). A few days later this instruction was modified so as to permit Neis to do work upon the verbal order of Reaugh, McHarg, Hoffman or Donahue, the two latter being among the "bosses" employed under Reaugh. For all work afterwards done upon written orders, or at the verbal request of the parties above named, with two possible exceptions mentioned in the opinion, Neis received full compensation from the company. It appears that the larger part of the account sued on was labor performed at the verbal

request of other bosses and employees than those mentioned, and after the giving of said notice to plaintiff. The cause was tried to the court without a jury, and judgment rendered in plaintiff's favor for the full amount of his claim. Appeal from this judgment.

BENNET, MASON and HAVENS, for appellant.

W. E. SCOTT and R. H. RHONE, for appellee.

HELM, J. The ruling of the county court upon the motion to quash the service of process was correct. By the record before us we are advised that defendant's counsel made a full and unlimited appearance in that court, announced himself ready for trial, waived a jury, and permitted a witness to be sworn on behalf of plaintiff, before calling attention to the motion, which had, in the first instance, been duly submitted to the justice, and presenting his jurisdictional objections thereunder. By these acts (not considering the effect of taking the appeal) all objections on the ground of defective service were waived. Counsel in argument deny the truthfulness of the record in this particular, and assert that they presented the question without making a general appearance, and before anything else was done in the county court. It is hardly necessary to say, what they frankly admit, that we must be governed by the record, which in this court imports absolute verity.

Nor did the court err in refusing to strike out a portion of the testimony given by the witness Cole. It was proper for him to detail so much of the conversation between Neis and McHarg as he overheard. The fact that some things may have been said in this conversation which he did not hear did not render this part of his testimony wholly inadmissible. With the latitude allowed on cross-examination, the danger of injustice, adverted to by counsel, can hardly be said to exist. Besides, it may be further remarked that, even if this evi-

dence were improperly admitted, we would not consider the error sufficient ground for reversal. The testimony objected to, with the accompanying admissions, was of very little importance, and could scarcely have received serious consideration.

Reaugh had full authority to prescribe the conditions upon which plaintiff should do work for the defendant company. It was competent for him, through his clerk (McHarg), to prohibit as he did any such work, except on written orders from himself or McHarg. It was perfectly proper, also, for him to enlarge this instruction or notice by excepting from its operation Hoffman and Donahue, two of the numerous "bosses" in the company's employ. It is clearly established that all the items in the bill sued upon referred to work done without written authority, and after plaintiff received the note above mentioned. Plaintiff, in rebuttal, testifies that on one occasion McHarg came with four or five wagons to be mended, and told him to do the work. He also says that Hoffman directed him to do some work for parties whom he had previously refused because they had no written orders. His testimony concerning the wagons is directly contradicted by McHarg; but, as to these portions of his bill, the finding of the court below must be sustained. So far as there was conflicting testimony, it was one witness against another, and we will not presume to say that credit should have been given to McHarg instead of plaintiff.

But we are not advised as to the amount of these items, and they cover only a part (probably a small part) of the bill sued upon. With reference to the remaining portions of the account, we have this state of facts: McHarg testifies clearly and unequivocally that plaintiff did the work without any authority, verbal or written, from either himself, Reaugh, Hoffman or Donahue. In answer to this evidence, there is simply the declaration by plaintiff, in rebuttal, "that all the work done on that

bill sued for was done by the written or verbal orders." It will be observed that he does not assert the work to have been performed upon the written or verbal orders of Reaugh or McHarg, or even upon the verbal orders of Hoffman or Donahue. The declaration of plaintiff is consistent with the proposition that the work referred to, or at least a part thereof, was done under the verbal orders of employees other than those from whom he was authorized to receive such orders. And this construction of the language is sustained by his own testimony in chief. He there admits that after August 12th the various wagon, corral and stable bosses had work done without orders, expressly mentioning the name of Callihan, a stable boss. Thus this unimpeached testimony of McHarg is corroborated by that of plaintiff himself. The court allowed the full amount claimed by plaintiff upon his entire account. It is therefore clear that the judgment given covered, in part at least, work for which, under the testimony before us, plaintiff was not entitled to compensation. It will for this reason be reversed, and the cause remanded for further proceedings.

Reversed.

MCDONALD V. CLOUGH ET AL.

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10	169

1. If an instruction is not properly incorporated into the record, or if no exception appears to have been taken thereto, appellant will not be heard to complain.
2. If, during the existence of a partnership, goods are purchased and received by it, a declaration by one of the partners after the transaction, or dissolution of the firm, that he would not be responsible for the account, does not relieve him from liability.
3. Proof of an account should be made by producing the books in which it is entered, or by offering a copy of the account, properly identified, but the failure so to do may not be fatal to a recovery.

Appeal from County Court, Arapahoe County.

THIS suit was brought by N. H. Clough & Co. against John Atkinson and R. P. McDonald as copartners under the firm name of "Atkinson & McDonald." Plaintiff demanded of defendants the sum of \$195.50 upon a book account for goods sold and delivered to the defendant partnership. The trial in the county court resulted in a verdict and judgment in plaintiffs' favor for the full amount of the demand. The instruction mentioned in the opinion, asked by defendant McDonald, and refused by the court, reads as follows: "If the jury believe from the evidence in this case that McDonald told N. H. Clough, one of the members of said firm, that he (McDonald) would not be responsible for Atkinson's account, or for goods furnished Atkinson, then the jury are instructed that the plaintiffs cannot recover anything for any meat delivered after that time."

The remaining facts are sufficiently stated in the opinion.

Mr. J. P. BROCKWAY, for appellant.

Mr. JOHN A. CLOUGH, Jr., for appellees.

HELM, J. This cause was originally begun before a justice of the peace. Therefore, upon the retrial on appeal in the county court, there were no written pleadings.

The instruction discussed under the first assignment of error nowhere appears in the record before us; nor is there in the record an objection or exception on the part of appellant to any instruction given for appellees. Either of these considerations would absolutely forbid our further noticing this assignment.

The county court committed no error in refusing the instruction asked by appellant, who was one of the defendants below. This instruction wholly ignores the question of a partnership between McDonald and Atkin-

son, and the notice mentioned was given after the asserted liability accrued. If such partnership existed at the time the goods were sold and delivered, and if they were actually delivered to and received by the firm, a declaration by one of the partners subsequent to the transaction, that he would not be responsible for the account, could not in law relieve him of such responsibility. Besides, as no meat was sold or delivered after the conversation on May 22d between McDonald and Clough, in which the former denied his liability, there was no evidence upon which to base the instruction refused.

The existence of the defendant copartnership when the account sued on accrued is involved in considerable doubt. Had the jury found differently upon this question, we would not disturb their verdict, but there is a good deal of proof to support their finding. The testimony of five witnesses tends to sustain plaintiffs' theory in relation thereto. Defendant McDonald denies the partnership, but defendant Atkinson, who was one of the five witnesses mentioned sworn for plaintiffs, directly contradicts the testimony of McDonald in this particular. If the written dissolution of March 18th, offered in evidence, referred to the defendant firm, it would probably be decisive. It would show that, prior to that date, such a partnership existed, and that it then terminated. But the firm sued is "Atkinson & McDonald." The firm spoken of in the dissolution agreement is "R. P. McDonald & Co." Atkinson testifies that the latter partnership was engaged in *brick laying*, while the former was entered into for the purpose of *brick making*, and that another copartnership "writing" was drawn and executed when the firm of Atkinson & McDonald was formed, which writing was left with a Mr. King, who drew it. Since the proofs upon this issue are conflicting, and since it is the peculiar province of the jury to pass upon the credibility of witnesses, and resolve conflicts in testimony,

we shall decline to reverse the case upon the assignment of error now under consideration.

The remaining assignment discussed relates to the sufficiency of the evidence to sustain the judgment. Plaintiffs committed a serious oversight in not producing their books, and proving the account therefrom, or offering in evidence the copy of the account identified by Atkinson; but we are of opinion that, under all the circumstances disclosed by the record before us, this mistake should not be held fatal. An itemized bill or copy of the account was shown to defendant Atkinson while giving his testimony. He examined the same, and repeatedly said he believed it to be correct. He also testified (still looking at the bill) that the indebtedness as represented thereby was \$195.55. Here was a clear and positive admission by one of the defendant copartners that the different entries constituting the entire account were correct, and that the total demand of \$195.55 was just. By this and other testimony the jury were informed that plaintiffs had sold and delivered to defendants a quantity of meat that had not been paid for; that the just and reasonable value of this meat was \$195.55, which amount was due the plaintiffs. For this sum the verdict was returned and the judgment entered.

While McDonald, the only appellant, denies his individual liability in the action at bar, he in no way controverts or challenges the correctness of the account itself, or the amount claimed. He simply treats it as a personal obligation of Atkinson with which he has nothing to do. We are not advised by the record that the copartnership of Atkinson and McDonald had been dissolved prior to the trial in the county court; but, were such dissolution an admitted fact, there is much and weighty authority to sustain the reception in evidence, against McDonald, of Atkinson's declarations and admissions upon the witness stand concerning the correctness of the account;

also the amount due thereon. Many cases, both in England and America, adhere to the rule that a partner's declarations and admissions, after dissolution of the firm, concerning transactions with the firm in the line of its business before such dissolution, are admissible against his former copartner. Pars. Partn. (2d ed.) 199, 200, note *p*; also, *id.* 404 *et seq.* But it may be sufficient to say that McDonald is not in a position to attack the admission of this testimony, as he reserved no exception thereto at the trial.

We shall decline to hold that the verdict was not warranted by the evidence. As counsel contend, the proofs point strongly to the conclusion that plaintiffs did not know of the partnership when they sold the meat and gave the credit. But, if such were the fact, it would not prevent a recovery against McDonald. A secret or unknown partner is held liable for debts incurred in the partnership business, because, while he adds no credit to the firm, he shares in the advantage secured through its existence. Pars. Partn. (2d ed.) 32.

The judgment is affirmed.

Affirmed.

YENTZER V. THAYER ET AL.

1. The entry of default and judgment against a defendant before the return day of the summons, in the absence of himself or counsel, is a proceeding *coram non judice*. And the cause remains for trial as though such pretended default and judgment had not been taken.
2. Under the statute, if the plaintiff fails to appear before the justice at the hour named in the summons, his record must show either a continuance or dismissal. Being silent in this respect a total discontinuance must be presumed.

Appeal from County Court, Summit County.

SUIT was begun before a justice of the peace by plaintiffs upon the account in controversy. Summons issued

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10	221
10	63
1a	306

and was duly served. Prior to the hour named in the summons for her appearance, default and judgment were entered against defendant. On the succeeding day, plaintiffs caused a new summons to be issued by the same justice, and defendant was a second time sued, and duly served with process for the same asserted debt. On the return day of the second summons, defendant appeared, a trial of the cause was had upon the merits, and judgment again rendered against her. She then appealed from the latter judgment to the county court, where plaintiffs obtained the judgment from which the present appeal is taken. After the trial of the second cause before the justice, plaintiffs themselves attempted to take an appeal from the former judgment of the justice to the county court. There, at the first opportunity, they caused an order to be entered dismissing the first suit without prejudice. At the time this order was entered, the second suit was also pending in the county court upon defendant's appeal. The opinion sufficiently states all other essential facts.

Mr. A. D. BULLIS, for appellant.

Messrs. J. M. BREEZE, L. L. BREEZE and T. C. EARLEY, for appellees.

HELM, J. The evidence before us fully warranted the finding and judgment of the court below.

The remaining objection here urged by counsel rests upon the refusal of the county court to abate the action on the ground of a former suit pending. Defendant was entitled to be heard at the time specified in the first summons issued, and entering default and judgment against her before that time, in the absence of herself and counsel, was a proceeding as completely beyond the jurisdiction of the justice as though the process had never been served. The denial to her, in this way, of her right to appear, was, "in legal effect, the recall of the citation"

served upon her. The acts mentioned were wholly without warrant or authority; and the judgment of the justice, thus rendered, was void. "A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." *Windsor v. McVeigh*, 93 U. S. 274; *Howard v. Clark*, 43 Mo. 344. This legal proposition was practically recognized by the justice himself when he made the following docket entry on the subject: "This judgment was rendered by mistake, and without legal notice, and hence is dismissed and set aside."

The cause remained for trial as though there had been no pretended default or trial or judgment. But as to what was done when 3 o'clock P. M., the hour named in the summons, arrived, we are not informed. The justice's transcript in evidence is silent on the subject. It shows no appearance by either plaintiff or defendant, or any reason for their absence, neither does it indicate that the cause was continued. We must therefore assume that the parties did not appear, and that nothing was done. The correctness of this assumption is demonstrated by subsequent proceedings. But when plaintiffs failed to appear at the time fixed in the summons, or to give sufficient reason for their non-appearance, it was the duty of the justice to dismiss the cause. Sec. 1941, Gen. St. And, under the circumstances above narrated, although the justice failed to obey this statute, a total discontinuance of the cause took place. Moore, Justice, §§ 492, 493, and cases cited. Therefore, when plaintiffs, on the succeeding day, brought the present action upon the same account, the first suit was not pending. There was no ground for plea in abatement, and had one been properly presented it must have been overruled.

The subsequent attempted appeal by plaintiffs themselves from a judgment that was void, and in a cause that

was out of court, amounted to nothing. It could in no way affect the foregoing conclusion.

The judgment of the county court is affirmed.

Affirmed.

MURRAY V. HOBSON.

1. It is a settled question that, when a defendant in ejectment files a cross-complaint assuming to set up equities entitling him to affirmative relief, the facts relied upon therefor must be as fully stated as they are required to be in an original bill praying affirmative relief.
2. Where a trustee in whom is vested, under the law of congress and by patent from the United States, the lands comprising a town site, to be held in trust for the use and benefit of the occupants thereof, has executed a deed of a parcel of such land to one claiming to be a beneficiary of the trust, the legal title of such parcel passes out of the trustee and vests in the grantee; no individual not then a beneficiary can thereafter in his own right question the validity of such conveyance; nor can he, by subsequent intrusion upon the possession of the holder of the legal title, acquire a right to inquire into or litigate the question whether all the preliminaries required by the local law were taken by the party holding the title from the trustee.
3. When a statute is referred to by general descriptive particulars, some of which are manifestly false and others true, the former may be rejected as surplusage, provided the remainder is sufficient to show clearly what is meant.
4. Where a statute would operate unjustly, or absurd consequences would result from a literal interpretation of terms and words used, the intention of the framers, if it can be fairly gathered from the whole act, will prevail.
5. A deed of land included in a town site described the land as "designated on the recorded plat as the vacant land formed by change of the bed of the Arkansas river," and by metes and bounds. In an action involving the title to the land conveyed, *held*, that the whole description was properly admitted in evidence, and that oral testimony was admissible to identify the land (especially as no tract designated in the manner stated appeared on the plat), although the plat itself, or a copy, should be produced, or the non-production thereof accounted for, before admitting such oral evidence.
6. Where copies of a town plat were examined by court and counsel on a trial to the court, were marked as exhibits, and copies of them

10	66
10	79
10	66
13	62
10	66
17	494
10	66
19	482
10	66
9a	541
10	66
24	260
24	286
10	63
3	132
e36	368
j38	41

attached to the record, and the judge found that the papers were true copies, and that the original was lost, and could not be produced. *held*, that a technical objection, raised on appeal, that the copies were not introduced in evidence, would not be allowed to prevail.

7. In a description of land in a deed, a call for block 82, *held* properly rejected, where it appeared from the whole description that block 80 was intended.

Appeal from District Court, Pueblo County.

THE facts are stated in the opinion.

Messrs. J. C. ELWELL, STONE and ANDERSON, and VINCENT D. MARKHAM, for appellant.

Messrs. CHAS. E. GAST and JOHN M. WALDRON, for appellee.

BECK, C. J. The first, second and third errors assigned involve the merits of this controversy, and raise all the material questions affecting the proceedings and judgment.

The first alleged error complained of is the sustaining of the plaintiff's (appellee's) demurrer to the defendant's cross-complaint. The disposition of this ground of error will fix the equitable *status* of the appellant with respect to the subject-matter of this controversy, on which depend the pertinency and materiality of many of the questions presented by this voluminous record. It is a settled question that, when a defendant in ejectment files a cross-complaint, assuming to set up equities entitling him to affirmative relief, the facts relied upon therefor must be as fully stated as required to be in an original bill praying affirmative relief. The primary question, then, raised by the demurrer is, Does the cross-complaint state facts which entitle the defendant to affirmative relief?

The basis of the defendant's equitable claim to relief is substantially as follows: The lot in controversy, in 1869,

comprised a portion of the town site of the town of Pueblo, in the county of Pueblo. Mark G. Bradford was then county judge of said county, and in that capacity he entered the town site, and received the government patent therefor, under and by virtue of the act of congress of March 2, 1867, entitled an "Act for the relief of the inhabitants of cities and towns upon the public domain." This act of congress vested the title of the lands so entered in patentee, and his successors in office, in trust for the several use and benefit of the occupants thereof, according to their respective interests. On December 5, 1870, a deed was executed by George W. Hepburn, the county judge of Pueblo county, to one James G. Robinson, of twelve acres, parcel of the tract patented to Bradford, and, by subsequent intermediate conveyances, the plaintiff succeeded to Robinson's title to the portion thereof now in controversy.

Defendant alleges that the deed from County Judge Hepburn to Robinson was void by reason of Robinson's failure to perform certain preliminary steps required by law, and necessary to authorize a conveyance by the trustee. It is further alleged, as a result of Robinson's omission to perform these preliminary requirements, that the title to the land attempted to be conveyed by said deed remained in the said trustee, and his successors in office, until March 1, 1881, when, by virtue of an act of the state legislature, of that date, the legal title vested in the city of Pueblo, in trust for the community at large, and that it is still in said city.

The cross-complaint sets up no title under the patent of the United States, and no claim as a beneficiary of the trust vested in the county judge and his successors in office. The equitable right claimed by the defendant is the right to purchase the lot in controversy when it shall be appraised and offered for sale by the city of Pueblo, under the provisions of the state statute of March 1, 1881. The right to so purchase is based upon the defendant's

entry into possession of the property prior to the passage of the said last-mentioned act, and the continuance of said possession every since, together with the making of valuable improvements thereon. There is no allegation that the city of Pueblo has taken any steps to set aside the conveyance of the trustee to Robinson, or that it claims any rights in the lands described in that deed. Whether the title was rightfully conveyed to Robinson is a question for the town of Pueblo, and not for the defendant. The demurrer to the cross-complaint was therefore properly sustained. *City of Denver v. Kent*, 1 Colo. 337, 345; *Cook v. Rice*, 2 Colo. 136, 137; *Smith v. Pipe*, 3 Colo. 187, 198; *Leroy v. Cunningham*, 44 Cal. 600; *Naglee v. Palmer*, 50 Cal. 642; *McCreery v. Sawyer*, 52 Cal. 257; *Palmer v. Galvin*, 13 Pac. Rep. 476; *Sherry v. Sampson*, 11 Kan. 611; *Jackson v. Winfield Town Co.* 23 Kan. 542.

The doctrine of this court, as established by repeated decisions, is that when a trustee, in whom is vested, under the law of congress and by patent from the United States, the lands comprising a town site, to be held in trust for the use and benefit of the occupants thereof, has executed a deed of a parcel of such land to one claiming to be a beneficiary of the trust, the legal title of such parcel passes out of the trustee, and vests in the grantee; also that no individual, not then a beneficiary of the trust and interested in said land, is thereafter in a position to question, in his own right, the validity of such conveyance; nor can any one, by subsequent intrusion upon the possession of the holder of the legal title, under any pretense, acquire a right to inquire into and litigate the question, either at law or in equity, whether all the preliminary steps required by the local law were taken by the party whom the trustee recognized as a beneficiary under the law, and to whom he conveyed the fee. The allegations of the cross-bill afford the defendant no standing in equity, since he states no case entitling him to impeach the conveyance from the trustee to Robinson,

through whom, by intermediate conveyances, the plaintiff derived his title.

The second ground of error assigned is based upon the proposition that, from the date of the issue of the government patent, August 5, 1869, up to and including the date of the county judge's deed to Robinson, December 5, 1870, the trustee named in the patent, and his successors in trust, were wholly without authority to execute the trust with which they successively became invested, in any manner or to any extent; that the act of congress of March 2, 1867, required that the local legislature should prescribe rules and regulations for carrying said act into effect; and provided that any act of the trustee not made in conformity to such regulations should be void, and that no such law had been provided.

When the plaintiff offered to introduce in evidence, on the trial below, the Robinson deed as the foundation of his title, it was objected that the instrument was void *ab initio*, and the foregoing reasons were urged in support of the objection. This assignment raises the question whether any territorial law was in force at the date of the conveyance to Robinson, prescribing rules and regulations for the execution of the trust, and authorizing the trustee to execute conveyances. The original town-site act, passed by congress on May 23, 1844, was repealed July 1, 1864. Prior to its repeal, to wit, March 11, 1864, the territorial legislature passed an act providing the necessary rules for carrying into effect all trusts arising under it in the territory of Colorado. Laws 1864, p. 139. Subsequent to the passage of the congressional law of March 2, 1867, the territorial legislature, on January 10, 1868, repealed the legislative act of March 11, 1864, on the same day substituting therefor an act substantially similar in form and substance. See R. S. 1868, pp. 619, 690.

The latter act was in force at the time of the entry of

the Pueblo town site, at the date of the issue of the patent therefor to County Judge Bradford, and at the date of the execution of the deed by his successor in trust, County Judge Hepburn. But it is objected that this territorial law of January 10, 1868, was of no force, for the reason that it makes provision for the execution of trusts arising under the congressional act of May 23, 1844, long since repealed, and contains no allusion to the congressional act of March 2, 1867, under which the town site in question was entered and patented. It is true, the last-mentioned act of congress is not accurately described therein; but no one can read this law without experiencing a conviction of the legislative design to make the necessary provisions for executing the trusts created under and by virtue of said congressional act. It was the only territorial law on the subject of the entry of town sites on the public lands at the date of its passage, and, unless it can be fairly held applicable to the existing legislation on the subject, it must be treated as practically a dead letter. The latter view of a statute is never to be favored, if a more just and reasonable interpretation be admissible under well-established rules of law,—an interpretation which will not only sustain the statute, but preserve the rights which have accrued under it.

The supposed fatal objection interposed to the legislative act of January 10, 1868, consists, as we think, of a mere *misdescription*, or *false description* of the law of congress of March 2, 1867. The phraseology employed is as follows: "When the corporate authorities of any town, or the judge or judges of the county court for any county, in this territory, shall have entered at the proper land office the land, or any part of the land, settled and occupied as the site of any such town, pursuant to and by virtue of the provisions of the act of congress, entitled 'An act for the relief of citizens of towns upon lands of the United States, under certain circumstances,' passed

May 23, A. D. 1844, and any amendments that may be made thereto."

The Colorado legislature has, in several instances, taken the view that the congressional statute of May 23, 1844, being the original town-site act, all subsequent acts on the same subject are amendments thereto. This was the view taken in the territorial act of March 11, 1864. It made provision for the execution of all town-site trusts arising under the act of congress approved May 23, 1844, "and any amendments that may be made thereto." The same provision, as we have seen, appears in the revision of 1868, and the same description of the congressional law is given in the act of March 1, 1881, which repeals the law of 1868, and substitutes a new statute in its stead.

An inspection of the successive acts of congress upon the subject of town sites shows that those passed subsequent to May 23, 1844, are practically amendments of the original act. But since that act was repealed, as before stated, it is not accurate or proper to so describe them. Hence the territorial act of 1868 *misdescribes* the congressional act of March 2, 1867, under which the town site of the town of Pueblo was entered. Does this error or inaccuracy of description nullify the law, as claimed by the defendant? The rule of law applicable to an error or inaccuracy of description is: "The maxim, *falsa demonstratio non nocet*, applies to statutes as well as in other cases. * * * So, when a statute is referred to by general descriptive particulars, some of which are manifestly false and others true, the former may be rejected as surplusage, provided the remainder is sufficient to show clearly what is meant." Sedg. St. & Const. Law, 354, 355.

A general rule of statutory construction, but liable to abuse without qualification, is that the intent of the legislature, if it can be ascertained, is to govern. More ac-

curately expressed, the rule is that "effect shall be given to the intention, whenever such intention can be indubitably ascertained by permitted legal means." Another statement of the rule is "so to construe statutes as to meet the mischief, to advance the remedy, and not to violate fundamental principles." Dwar. St. 181, 184, and note. Vattel says: "That must be the truest exposition of the law which best harmonizes with its design, its objects, and its general structure." Among other well-established rules of construction are these: That statutes are to be construed with reference to the objects to be accomplished by them, and with reference to the circumstances existing at the time of their passage, and the necessity for their enactment. Where a statute would operate unjustly, or absurd consequences would result from a literal interpretation of terms and words used, the intention of the framers, if it can be fairly gathered from the whole act, will prevail.

Let the foregoing principles be applied to the exposition of a local statute of the character now under consideration. Congress passes a law for the relief of a certain class of citizens of the states and territories. Some of these citizens are, at the time of its passage, and others afterwards become, entitled to valuable property rights under this act. Former acts of the same character have existed, but they have been repealed, and the act in question becomes the foundation of such existing and accruing rights. But this act requires local legislation, supplementary thereto, to carry its remedial provisions into effect. Subsequent to the passage of this act, the territorial legislature has passed the requisite supplemental statute, providing the necessary mode and means of carrying into effect the act of congress. Among other things, it specifies what acts shall be performed by the local corporate or judicial officers, as the case may be, in order to obtain from the general government the title of the property to which certain of its citizens have or shall

become entitled under the act of congress. This local law prescribes the acts necessary to be performed by beneficiaries of the trust, in order to obtain conveyances of their several lots and parcels of land, the titles of which are vested in the trustee. Every rule and regulation required by the act of congress is embodied therein. In respect to certain preliminary steps necessary to be taken by the beneficiaries, the precise number of days within which these acts must be performed after publication of notice by the trustee that the town site has been entered is specified in the law. Although this is the only local law or supplementary act to the law of congress, and although its provisions are prospective, still it is strenuously contended by counsel for defendant that it is no law at all on account of the misdescription mentioned.

As against this view are the legal principles above stated. The structure and provisions of the act also show it to have been the intent and purpose of the legislature to provide therein the rules and regulations required by the congressional act of March 2, 1867, for the execution of trusts arising under it. The same purpose is indicated by the circumstances existing at the time of its passage, the objects to be accomplished by it, the necessity for the law, and the unmistakable internal evidence furnished by the context and subject-matter of the act itself. The intention of the legislature being thus clearly ascertained, the validity of the statute is established by well-settled rules of construction, and the only duty remaining for the court to perform in this behalf is to execute the legislative will.

The objection of the quantity of land conveyed by the Robinson deed is not available in this action. *Smith v. Pipe*, 3 Colo. 198.

The ruling to the district court in the admission of the deed from Hepburn, county judge, to Robinson, of date December 5, 1870, was correct.

Several errors are assigned upon the admission by the

court of oral testimony to identify the tract of land described in the Robinson deed. The position of appellant's counsel is that this deed contains two descriptions of the land intended to be conveyed,—one by way of reference to the recorded plat of the town, the other by metes and bounds. They contend that the only evidence necessary to ascertain definitely the boundaries of the land conveyed was the *first description* and the plat referred to in the deed; that the admission of the *second* description, by metes and bounds, was unnecessary, and liable to create a conflict as to the identity of the tract. We have carefully examined the entire evidence on this subject, and are compelled, in view of the facts and circumstances of the case, to reject this position as unsound. The land conveyed by County Judge Hepburn to Robinson is thus described in the deed: “* * * Grant, bargain and sell unto the said James G. Robinson the following lot of land, situate, lying, and being in the town of Pueblo, county of Pueblo, and territory of Colorado, and designated on the recorded plat of said town *as the vacant land formed by the change of the bed of the Arkansas river*, and bounded as follows, to wit: Commencing where the east line of Court street leaves the south line of the town of Pueblo, and running north along said line to the alley in block thirty-one (31); thence east, along said alley and the south line of M. McCarty, in block thirty-two (32), to Santa Fe avenue; thence south to the Arkansas river; thence up said river to where it is intersected by the south line of the town; thence along said line to the place of beginning, and *not interfering with the plan of the streets and alleys adopted in town plat in my office.*”

Appellant's counsel persistently objected on the trial to the admission of parol evidence to identify the land described in the Robinson deed; one ground of objection being that the plat referred to in the deed became by reference a part of the deed, and that parol proof of the

identity of the land conveyed was incompetent until the plat should be first produced. We think this objection should have been sustained, and the plaintiff required to either produce the plat or show that it was not in his power so to do. This would have been the proper order of proof on part of the plaintiff. The plaintiff finally introduced considerable proof going to show that the plat referred to in the deed was not in the county clerk's office, and had not been for several years, nor any record of it. A copy of the original, however, was produced by the witness Fosdick, who made the original for the use of Judge Bradford at the time of the entry of the town site. Witness testified that it was a correct copy of the original, and had not been out of his possession since it was made, in March, 1869. There was likewise another plat of the town produced and examined by the court and counsel, bearing the same date, and made by the same person.

The appellant raises the rather technical point that these plats were not introduced in evidence. But, in respect to all these objections, when it is considered that the trial was to the court without a jury, and that both court and counsel examined these plats on the trial; that they were marked as exhibits, and copies of them attached to the record; also that the trial judge found that the plat produced by the said witness Fosdick was a true copy of the original town plat referred to in said deed, and that the original was lost, and could not be produced,—we are of opinion that no error, prejudicial to the substantial rights of the appellant, was committed.

In reference to the objection that parol testimony was not admissible to identify the land, it is wholly untenable. *Pipe v. Smith*, 4 Colo. 444. The copy of the original *town-site plat*, as well as the certified copy of the plat of same date, fail to satisfy the so-called *first* description of the deed, to wit: "*And designated on the recorded plat of said town as the vacant land formed by*

the change of the bed of the Arkansas river." No tract of land so "*designated*" appears on either of these plats. But, even if it did, the "*vacant land*" having been formed by the change of the river twelve years prior to the trial, great changes may have occurred in its boundaries since that time by subsequent changes in the bed of the river.

Respecting the so-called *second* description, it was clearly admissible. The only objectionable feature about it is the misdescription of one call, which is a mistake so patent as not to raise a doubt as to the course intended. After describing a course north on the east line of Court street, to the alley in block 31, then an east course along that alley and a certain strip of land, a distance of two blocks is described reaching to Santa Fe avenue. This course is described thus: "*Thence east along said alley, and the south line of M. McCarty, in block thirty-two (32), to Santa Fe avenue.*" The error is in the number of the latter block, stating it as number "*thirty-two*," whereas the block lying directly east of block thirty-one, and on a true line to Santa Fe avenue, is block *thirty*. The course described follows the entire length of block *thirty-one*, on the alley, and, continuing in the same direction, enters the alley in block *thirty*. This alley is not platted entirely through the latter block, and the oral evidence shows that the south line of the land of McCarty diverged from the alley to the southeast, causing the same divergence of the survey in question, but that the line closed on the avenue mentioned. Block *thirty-two*, on the contrary, lies directly north of block thirty-one, and cannot be reached on the line described. Neither did McCarty own any land in that block, while he did in block *thirty*. It is clear that the words "*thirty-two*" are inconsistent with the other calls mentioned in the boundaries described; and it appearing that the remaining particulars, descriptive of the land mentioned in the

deed, are sufficiently certain, the call for block *thirty-two* will be rejected.

In our judgment there is but *one description* of the premises granted inserted in the deed in question. The first portion thereof merely indicates 'the *situs* of this vacant tract, while the *latter* limits its extent, and defines its boundaries. There was no error in admitting the entire description in evidence, and no error in admitting oral testimony to identify the land. The very means by which it was formed show the necessity for such testimony.

We have not considered the effect of the *curative statutes* and *deeds*, considering them unnecessary to the determination of the merits of the controversy.

The judgment is affirmed.

Affirmed.

10	78
24	286

MILLS V. HOBSON.

A deed of land made by the patentee of a town site to a beneficiary under the town-site act granted the land as described, "not interfering with the plan of the streets and alleys adopted in the town plat." *Held*, that this clause did not have the effect to reserve land which would be included within the lines of streets as extended, but which lines were not extended even on the plat, on the theory that such land was within the bounds of projected streets, and that, in ejectment by the successor to the grantee's title, the defendant, a mere intruder, could not set up that the town was entitled, by operation of law or otherwise, to an easement for the extension of its streets and alleys over the tract in question.

Appeal from District Court, Pueblo County.

THE facts are stated in the opinion.

Messrs. J. C. ELWELL, STONE and ANDERSON, and VINCENT D. MARKHAM, for appellant.

Messrs. CHAS. E. GAST and JOHN M. WALDRON, for appellee.

BECK, C. J. The record in this case involves the identical questions presented in the case of *Murray v. Hobson*, ante, p. 66. An additional question is raised by appellant's counsel in the present case, and discussed in the briefs of the respective parties. The parcels of land in controversy here are different also, being lots *three* and *four* of the same block (60), in Hobson's subdivision of a portion of the city of Pueblo, but Hobson's title thereto is derived from the same source as in the other case, these lots having been carved out of the same tract of land originally conveyed by Hepburn, county judge, to Robinson, by the deed of December 5, 1870. The same testimony, however, which proved that lot 14 of block 60 was within the tract of land conveyed to Robinson by the deed of Hepburn, county judge, establishes the fact that lots *three* and *four* of the same block were also within that tract.

It is contended, in the present case, that the lots in controversy are within a reservation in the Robinson deed, and therefore excepted from the grant. The clause relied upon follows the description of the premises conveyed, and is in the following words: "And not interfering with the plan of the streets and alleys adopted in the town plat in my office." It was conclusively shown on the trial, by the maps produced, and by the oral testimony, that neither streets nor alleys had been, up to the date of the Robinson deed, platted, laid out or used upon this tract of land. It also appeared from the testimony, and from an inspection of a duplicate of the town plat prepared in March, 1869, by Engineer Fosdick, who prepared the original plat for County Judge Bradford (the patentee of the town site), that the lines on said plat indicating streets and alleys in the town, so far as then laid out, had not been at the time of the trial, nor have they since been, extended over the tract conveyed to Robinson. The argument of appellant's counsel is that an intention is shown by the reservation clause to reserve

from the grant the strips of land that may be included within the lines of streets when the same shall be extended over it according to the plan of the survey of the town as designated on the town plat. Counsel assert with great assurance that the trustee had no power to convey the land that was then within the lines of streets thus "*projected*," but never extended, even upon the plat. It would seem to be a doubtful assumption that the streets of a town which are regularly surveyed, laid out and used, but which are not even extended by survey lines upon a vacant parcel of land formed by the changing of the bed of the river, are *projected* streets over such vacant land.

It is our opinion that, unless it can be held that there was an express reservation from the grant of the strips of land referred to by counsel, the point raised cannot be sustained in the present action. The proposition that "the streets were dedicated to the town, and the easement or service, if not the fee-simple, was in the public, if not then being used, certainly in abeyance, and in either case beyond the power of the trustee to convey," if conceded, cannot be applicable to the tract outside of the surveyed and platted portion of the town, over which no streets had ever been laid out, platted or used, and concerning which tract it was uncertain when the city authorities, if ever, would proceed to extend its streets. The act of congress contained no such a dedication in favor of the town as counsel assert, and neither does the territorial law then in force. The provision of the latter act was that the trustee should convey to the people or the legal authorities, within such time as was prescribed by the statutes for making conveyances to individuals, "the land used or laid out by the town authorities as streets, lanes, avenues, parks, commons and public grounds." R. S. 1868, p. 626, § 18. This was the rule prescribed by the proper authority for the guidance of the trustee. It is not pretended that any one of the con-

ditions mentioned in the act authorizing a conveyance to the people, or to the town, of the parts of the tract now claimed to have been reserved, had arisen or been complied with. But it is sufficient for the purposes of the present case to find, as we do, that there was no express reservation of the parcels referred to. It is wholly unnecessary to inquire what rights, if any, were reserved to the town in the Robinson deed, or whether it would be entitled, by operation of law or otherwise, to an *easement* for the extension of its streets and alleys over the tract in question. It will be soon enough to investigate that question when the town or city of Pueblo raises it. Such an inquiry by the appellant in this case is analogous to the claim made by the appellant in the previous case, that in an action of ejectment an intruder upon the possession of one holding the legal title, without title in himself, has a right to institute the inquiry whether his adversary, who obtained his title as a beneficiary of a trust, has performed all the preliminary steps required by law to entitle him to his conveyance. It is well settled that a mere intruder cannot raise or litigate such a question.

The judgment of the court below is accordingly affirmed.

Affirmed.

CARBONATE TOWN COMPANY V. IVES ET AL.

The payment to a justice of the peace of the cost of granting an appeal from his judgment within ten days of the rendition of the judgment is not a condition precedent to the right of appeal.

Error to County Court, Arapahoe County.

THE facts are stated in the opinion.

Messrs. TELLER and ORAHOD, for plaintiff in error.

Mr. M. B. CARPENTER, for defendants in error.

10	81
10	148
11	538
10	81
16	40

MACON, C. On the 24th of December, 1883, defendants in error recovered judgment against plaintiff in error, before one J. L. Crotty, a justice of the peace within and for Arapahoe county, from which plaintiff in error appealed to the county court of said county, and gave notice thereof in open court, upon the rendition of said judgment.

On the 31st day of December, 1883, it filed its appeal bond, which was approved by the said justice of the peace. Afterwards, and before the expiration of the ten days prescribed by the statute regarding appeals, counsel for plaintiff in error called on two occasions at the office of the said justice of the peace for the purpose of paying to the said justice the costs of granting said appeal, but on both occasions the justice of the peace was out, and the counsel found no one authorized to receive such fees. Again, on the 4th day of January, 1884, counsel called at the office at the same place for the same purpose, and endeavored to pay the said fees. The said justice, then being busy in the trial of a case, desired counsel to call at another time. On the next day said fees were tendered the justice, of which he accepted \$1.50, and transmitted a transcript of the case into the county court. On the same day, defendants in error, appellees in the county court, filed their motion to dismiss the appeal because the fees of the said justice of the peace had not been paid within ten days from the rendition of the said judgment; which motion the county court granted, and dismissed the appeal.

In this case there is but one question for decision, which is: Is the payment to the justice of the peace of the cost of granting the appeal from his judgment, within ten days of the rendition thereof, a condition precedent to the right of appeal? Secs. 1979, 1981. We hold it is not. The requirement of the statute that the party desiring an appeal shall, within ten days, file a bond for the security of the successful party, is reasonable and imperative; and upon

the filing of such bond within that time, which the justice of the peace approves, perfects the appeal. But whether the transcript shall be sent to the appellate court by the justice of the peace depends upon the fact that the appellant pays to the justice of the peace the cost of taking the appeal. If the justice of the peace chooses to give credit for such costs, or donate his services in preparing the transcript, he may do so, and, if he sends the papers from his court into the appellate court, the appellant has the right to insist that his case shall be heard. No one can be heard to complain in the appellate court of the omission to pay the costs of granting the appeal to the justice of the peace, except the justice himself. This provision of the statute is one made for the protection of the justice of the peace, which protection he may waive, and such waiver is conclusively established by the fact that he has sent into the appellate court the transcript of his docket. *Lick v. Madden*, 25 Cal. 211; *People v. Harris*, 9 Cal. 573.

In this case the justice of the peace accepted his fees after the expiration of ten days from the rendition of the judgment appealed from, and sent the transcript up to the county court. Certainly the fact that he had not been paid within the ten days prescribed by the statute does not oust the jurisdiction of the county court. *Bray v. Redman*, 6 Cal. 287.

We think the county court erred in dismissing the appeal, and that the judgment should be reversed.

STALLCUP and RISING, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the county court is reversed and the cause remanded.

Reversed.

DUNNING V. THOMAS.

In an action against the owner of a house by a mechanic who did some of the work in the building of it, it appeared that the contract for the building was made with other parties; that, some changes becoming necessary, plaintiff was consulted as to what he would charge for them, and an agreement for making them at such prices was indorsed on the original contract and signed by the original contractors, defendant saying to plaintiff that he would put it into the contract. Defendant also testified that he told plaintiff explicitly that he would not contract with him, but only with the original contractors. *Held*, that there was no contract between plaintiff and defendant, and the action could not be maintained.

Appeal from County Court, Larimer County.

THE facts are stated in the opinion.

Messrs. HAYNES, DUNNING and ANNIS, for appellant.

Mr. E. A. BALLARD, for appellee.

MACON, C. This suit was originally instituted before a justice of the peace of Larimer county, by appellee, Thomas, against appellant, Dunning, to recover the sum of \$100 for work alleged to have been done for Dunning on a certain brick house, in the town of Fort Collins, in the summer and fall of 1882, on two special contracts made between the parties,—the one on the 18th of July, and the other on August 2, 1882, by the first of which Dunning was to pay Thomas \$235, and by the second \$75, for certain brick work to be done upon Dunning's house. There were no written pleadings in the case, but Dunning denied at the trial that he had ever made any contract with Thomas to do any work, or that he had ever agreed to pay him for anything he might do on said house. The evidence is clear and uncontradicted that on the 13th of July, 1882, Dunning made a written agreement with Schooley and Shortridge for the rebuilding of the same house on which Thomas worked,

and for which he now claims a right of action against Dunning. By that written agreement the price for the work of rebuilding was fixed at \$1,025. This article of agreement was signed by Schooley and Shortridge on the one part, and Dunning on the other. On the 18th of July a change was made in the house, as it was to be rebuilt under the original contract of July 13th, which increased the expense \$304.25. This agreement as to the alteration was indorsed on the original contract, and signed by Schooley and Shortridge. Again, on August 2d, a further change was made in the building. It involved a further cost of \$75, which was also indorsed on the original, and signed by Schooley and Shortridge. The building was then completed, and during the progress of the work payments were made from time to time by Dunning to Schooley and Shortridge, until early in September, 1882, Dunning paid Schooley and Shortridge the whole of what was due them under these several contracts above stated, except \$150 retained to meet a lien filed by Smith and Soult. The whole amount paid by Dunning to Schooley and Shortridge and Smith and Soult, under these agreements, was \$1,404.25. After the payment to Schooley and Shortridge of this amount, Thomas called on Schooley and Shortridge for payment of what he claimed to be due him for his work upon said building; and, a disagreement arising between him and them as to the amount due him, he called on Dunning to inquire what he (Dunning) understood were the prices to be paid for the work specified in the two contracts of July 18th and August 2d, and whether satisfied or dissatisfied with Dunning's answer we know not; but a few days thereafter he sued Dunning for \$100, the same sum which was in controversy between him and Schooley and Shortridge. In the trial in the county court, Thomas proceeded upon the sole ground that he had contracted for the work he did on Dunning's house with Dunning alone, and not

with Schooley and Shortridge, and, failing to get his pay from them, he fell back upon Dunning as his primary pay-master, and looked to him for payment, though he would have been content had Schooley and Shortridge paid him.

The only point in this case, as we view it, is, Did Dunning contract directly with Thomas for the work which the latter performed on Dunning's house, or was the contract made by Dunning with Schooley and Shortridge, and did Thomas work under them as an employee or subcontractor for them? If Dunning did hire Thomas to do the work, then he must pay him; but if he contracted with Schooley and Shortridge only, and Thomas did his work for Schooley and Shortridge, then there was no privity between Dunning and Thomas, and the latter must look to Schooley and Shortridge for his wages, and not to Dunning. Whether such contract was made between Dunning and Thomas must depend upon the evidence in the case, and in discussing this question we shall rely entirely upon the testimony of Thomas, and the uncontradicted testimony of Dunning and Schooley. In his testimony, Thomas says "that he went to see Dunning on July 18th, and agreed with him as to the cost of the change in the original plan of the house to be rebuilt; that he supposed Dunning was going to put it in writing; that Dunning said: 'I will put this in the contract.' He had some other items, among others something for glass, and he said he would put it all into the contract. I said: 'I do not know why this should go into the contract. I have nothing to do with that; but I do not care so long as I get my pay.' He went to writing, and I went off." It is not denied that Thomas knew that the contract Dunning alluded to was that of July 13th. Thomas knew this fact, and hence the remark: "I do not know why this should go into the contract. I have nothing to do with that; but I do not care so long

as I get my pay." Dunning did not ask Thomas to sign this additional agreement, but required Schooley and Shortridge to do so, and they complied. The same may be said of the second alteration of August 2d.

Leaving out of sight the positive declaration of Dunning that he would not contract for this work with any one except Schooley and Shortridge, and looking at the case upon the statements of Thomas alone, it is unquestionable that Dunning did not intend to enter into any engagement with Thomas, and that the latter so understood, or should have done so. An agreement is a meeting or accord of two or more minds as to a particular thing; and, if one sought to be held as agreeing dissents in the ordinary language of business intercourse, it is an absurdity to say he did agree merely because the other party insists he did not understand the language. It seems impossible to doubt that Thomas understood perfectly that Dunning did not intend to contract with him from the conversation between them detailed by Thomas, and we cannot comprehend how one can compel another to enter into contractual relations with him when that other refuses so to do.

If now we look to the testimony of Dunning and Schooley, which is uncontradicted, we find a stronger confirmation of the views above expressed. Dunning says he told Thomas plainly and unequivocally on the 18th of July, when the first change in the original contract was suggested and made, that he would not contract with any other persons than Schooley and Shortridge; and this was said in answer to Thomas' declaration that he did not see what he had to do with the contract between Dunning and Schooley and Shortridge of the 13th of July. Dunning's exact language is this: "Thomas' bill was \$125 too much, I thought. He figured finally to do the work that much less. The glazier's bill had been obtained. After Thomas agreed to do the work at price

named, I added the three bills, viz., the carpenter's, mason's and glazier's, together. They came to \$304.25. I started to put it into the contract with Schooley and Shortridge. Thomas demurred, saying he did not see what he had to do with that. I said I would only have my contract with one party; have it in writing, and then try and live up to it; that I did not propose to have contracts with several. Thomas said: 'Well, as long as I get my pay, I don't care.' I then reduced the understanding to writing, which is on back of contract under date of July 18th. Then read it over in presence of Schooley and Thomas. It being satisfactory, I signed and Schooley signed. Then Thomas and Schooley left the office." As to the second alteration, Dunning says: "Second change was entirely in brick. Schooley and Shortridge were to have Thomas' figure, and tell how much. He came to me saying they so instructed him, and it came to \$197. I refused to pay such price. Change had to be made. Tried to get figures of others. In a week, Markham said he would do it for \$65, but was busy. I told Schooley I would pay \$75 to have the work proceed. Thomas came to my office; said Schooley had thus informed him, and he would go ahead. Schooley came to my office that day. I reduced this second change to writing, and he signed it with his name and Shortridge's." Schooley's testimony is to the same effect as to Dunning's refusal to contract with Thomas, and as to the contracts for the alterations being made between Dunning and himself and Shortridge.

Upon this state of facts it is obvious that no contractual relations existed between Dunning and Thomas, and that the county court misconceived the law arising out of the transactions detailed, in holding that Dunning was liable to Thomas by virtue of a contract between them. In this view of the law, it is unnecessary to discuss the weight of the conflicting evidence so strongly insisted upon by counsel for appellant.

We think the county court erred, that the error was material, and that the judgment should be reversed.

STALLCUP and RISING, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment is reversed and the cause remanded.

Reversed.

ALVORD V. STRICKLER, RECEIVER, ETC.

The receiver of a bank, under the authority of the proper court, sold the bank's interest in certain mining property, partly on deferred payments due at times expressly stipulated in the agreement. The purchaser was unable to obtain possession, the property being in litigation, and in the hands of another receiver. The evidence not showing an agreement to put the purchaser into possession, *held*, that the court's refusal to compel its receiver to extend the time of the deferred payments was not reviewable.

Appeal from Superior Court of Denver.

THE facts are stated in the opinion.

Messrs. MARKHAM and DILLON and PATTERSON and THOMAS, for plaintiff in error.

Messrs. M. B. CARPENTER and C. J. HUGHES, for defendant in error.

MACON, C. The facts of this case are, shortly, these:

In March, 1883, James M. Strickler, the respondent, was appointed receiver of the Exchange Bank of Denver by the superior court of Denver. Among the assets of said bank was certain mining property in Summit county, Colorado, of the description following: The undivided one-half of the Wire-Patch placer claim, the undivided one-half of the Elephant, and the undivided one-half of the Frederick; the Great lodes; the undivided

one-fourth of the Ontario lode; and all the interest, whatever the same might be, of the said J. M. Strickler, as receiver, in the Queen of the Forest, the Emperor, the Little Morgan, and the Triangle lodes, and the Wire-Patch ditch and water-rights, as the same were described in their respective location and relocation certificates.

- The interest of the said J. M. Strickler, as receiver, in the said Queen of the Forest, the Emperor, the Little Morgan, and the Triangle lodes, and in the Wire-Patch ditch and water-rights, was an uncertain, indefinite and undescribed interest. On October 18, 1884, said Strickler, as such receiver, by authority of said superior court, entered into a contract with petitioner, C. C. Alvord, to sell him this property for \$125,000, \$42,000 of which, in furniture then in the St. James Hotel in Denver, was to be paid down, and the balance of the price, \$83,000, was to be paid on or before the 18th day of October, 1885; and by the agreement in writing then and there entered into between the parties it was stipulated that default in the payment at the agreed time was to determine the contract, and Strickler was to keep what had been paid by Alvord, and to release Alvord from all liability for the balance remaining unpaid. It was further agreed that Alvord might go into possession of the property, and mine therein, and retain all profits therefrom, until the 12th day of April, 1885, after which date he (Alvord) should pay to Strickler one-half of the net proceeds of the mines. By the agreement it was further provided that time should be of the essence of the contract; and that upon any default on Alvord's part in the payment of any of the sums provided to be paid in the future, at the times fixed therefor, the said agreement should cease and determine, and Alvord should forfeit to Strickler all sums before that time paid under said agreement.

On the 30th of August, 1884, by reason of litigation between Strickler, as receiver of the said Exchange Bank, on the one side, and one Murphy, Litton and McCarty

on the other, as to the title to this property, or some part thereof, one Charles A. Walker was appointed receiver of the same, by the district court of said Summit county; and on or about the 23d day of September of that year said Walker took possession of the same, and worked and mined in the Elephant lode until the 23d of October following, on which day he quit work thereon, and discharged all his employees. About the 25th of October, 1884, Alvord, in company with one Cronkhite (who had a contingent interest in the agreement for the sale of the property), went to Breckenridge and demanded possession of the Elephant lode from the said receiver, Charles A. Walker, who offered to put Alvord or Cronkhite in possession if they, or either of them, would indemnify him, which they refused to do, and therefore failed to get possession. Afterwards, Murphy took possession of the Elephant lode, and held it during the winter and spring, until about the 20th of April, 1885, when Cronkhite was let into possession, under the receiver, Charles A. Walker, and held it continuously until the trial of this cause. While Walker was in possession as receiver aforesaid, he contracted an indebtedness in working the Elephant lode of about \$3,000, which on the 3d day of December, 1884, was made a lien on the property by the district court of said Summit county; but at the trial of this case no steps had been taken to enforce such lien, and by a subsequent order of said court the receiver was required to pay off said lien out of the first net proceeds of the mine. While Murphy held possession of the mine, during the winter of 1884-85 and spring of 1885, he worked it unskilfully, and left it in a ruinous and dilapidated condition; and, when he quit the same, took away the ladders, ore chutes, railroad tracks, ore cars, and all the tools and implements belonging thereto, so that when Cronkhite took possession he found it necessary to expend considerable money in putting the mine into condi-

tion for profitable working. Strickler furnished him \$250 for this purpose, but Alvord nothing. Cronkhite increased the indebtedness on the mine to \$6,000 in putting it in repair. These facts are undisputed.

In this posture of affairs, Alvord, on the 30th day of September, 1885, filed his petition in the superior court of Denver, praying to be relieved from the payment of the remaining \$83,000, to become due, under the contract, on the 18th day of October ensuing, and for an extension of the time for such payment one year after he should obtain possession of the premises. His prayer was founded on the averments that he executed the agreement to buy the property under the belief that he could obtain the money for the last payment by working the Elephant lode, which belief Strickler well knew and encouraged; that during the negotiations for the purchase Strickler promised and assured him that he should have the possession of the property, so that he could work and mine it, and that but for such assurances he would not have agreed to buy it, nor made the contract of the 18th of October, 1884, and that Strickler knew that he would not have done so, and also knew that he depended upon the proceeds of the property for the means with which to meet the deferred payment of \$83,000. Furthermore, he averred that the property was in litigation, and was in the hands of a receiver, and in debt, of all which facts he was during the negotiation for and at the execution of the contract in ignorance, but that the said Strickler was cognizant of them all, and concealed the same from him; that after the execution of the contract he went to Summit county, and endeavored to get possession of the Elephant lode, and could not, and that Strickler not only did not put him into possession, but actively prevented him from obtaining it; and that he had never had the possession, and had no means with which to pay the deferred payment of \$83,000. Several

other facts are alleged, among which are the erection of a mill, the orders of the district court of Summit county, etc., but they are immaterial, and need not be stated.

Respondent answered, and denied that he knew Alvord depended on the proceeds of the property to pay the \$83,000; denied that he encouraged the belief that he could do so by working the said property; denied that, pending the negotiations, he promised or assured Alvord that he should have possession of the property, or any part thereof; denied that Alvord was ignorant of the fact that the property was in litigation, was in the hands of a receiver, or that it was in debt; and denied that by any act, or refusal to act, by him, he kept Alvord out of possession.

The cause was heard upon written and oral evidence, the written evidence being made exhibits in the case, which appear in the record, and the court proposed to petitioner a modification of the agreement as to time, which he rejected, whereupon the petition was dismissed, from which decree the petitioner appealed to this court.

Eleven errors are assigned as ground of reversal of the decree of the court below, but counsel for appellant relied in argument upon the sixth assignment only, which is that "the court erred in its finding that the equities of the case were in favor of the defendant." In fact, counsel for appellant, in their brief and argument, at page 2, say: "The main, in fact the only, points of controversy in the case are these: Did Strickler contract or agree to put Alvord in possession of the mining property? and, if so, did he put him in possession?" In this view of the case (and it is a correct one), the objections to the admission of evidence, and the exceptions to the refusal of the court to allow certain questions to be answered, are of no weight, and cannot affect the solution of the questions raised in the record. The proofs do not support this view of the case, and the petition amounts to no more than an application to the court to compel its receiver to make a

supplemental contract with the petitioner. Whether such authority exists in courts, it is not necessary to decide; but it is clear that the refusal so to do in this case is not reviewable, and therefore the decree of the superior court of Denver should be affirmed.

RISING and STALLCUP, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the decree of the court below is affirmed.
Affirmed.

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4a 209

10 94
13a 515
10 94
17a 512

CHAMBERLIN ET AL. V. GILMAN.

1. The keeper of a boarding-house for railroad employees made an agreement with the railroad company whereby the boarding dues of each employee were deducted from his pay, and forwarded in the form of a check to the boarding-house keeper each month. Subsequently he procured an advance of money from a bank on the credit of the amounts which were to fall due on the following pay-day, and by promising to turn such amounts over to the bank. The railroad company consented to transfer such payments to the bank. *Held*, that this constituted an equitable assignment of such sums so as to vest title in the bank as against a creditor of the boarding-house keeper, who garnished the same in the hands of the railroad company.
2. Subsequent declarations of the boarding-house keeper indicative of an intention to set apart such sums to the payment of his debt to plaintiff in garnishment are not admissible in evidence to impeach the title vested by the prior assignment.
3. The mere fact that the railroad company, after it had consented to the transfer of the indebtedness to the bank, continued to draw its check in favor of the boarding-house keeper, *held*, not to divest the bank of the title acquired under the equitable assignment.
4. Whether the railroad company had notice of such assignment in no way affects the rights of plaintiff in garnishment, and therefore the admission of evidence of such notice is not prejudicial error.
5. Such an assignment may be by parol, and is not affected by the statute of frauds, which require sales and assignments of goods, and grants or assignments of trusts, to be evidenced in writing.

6. Where the intervenor in a garnishment claims title through an equitable assignment of the fund, based, in addition to other evidence, upon verbal declarations and conduct, it is not error to refuse an instruction which assumes that the intervenor's title depends solely upon a written order.

Appeal from County Court, Arapahoe County.

THE facts are stated in the opinion.

Mr. L. C. ROCKWELL, for plaintiffs in error.

Messrs. BENEDICT and PHELPS, for defendants in error.

RISING, C. The appellants brought an action against B. M. Gilman upon book-account, and garnished the Denver, South Park & Pacific Railroad Company as a debtor of Gilman. The garnishee answered that it had \$1,495.88 in its hands in checks it had drawn in favor of Gilman, and that said sum and checks were claimed by the City National Bank of Denver under some agreement between itself and said Gilman, and asked that the court make an order that said bank be brought into court as a claimant for this money, and prove its title thereto. The bank filed a petition of intervention, in which it was alleged that Gilman was, at the time of the commencement of this suit, and had been for many months prior thereto, the keeper of a boarding-house at Como, on the line of said railroad, and had, during such time, been accustomed to board divers employees of said company, but not for the company; that said company, in consideration that the rates of board should not exceed a certain just and reasonable rate agreed upon, had agreed to retain from the pay of its employees boarding with said Gilman, each month, such amounts as were severally due and owing from such employees to said Gilman; that at the end of each month a considerable portion of the pay of the company's employees was to be paid over to said Gilman, or, upon his order, to whom he

might direct; that, at least three or four months prior to the service of the said garnishee summons, the said Gilman, being about to procure, by loan, from the said bank, money to enable him to maintain and carry on said business, and in order to secure said bank therefor, gave to the officers of said company orders and instructions to pay to the said bank all moneys due or to become due him under said agreement, and so to continue until otherwise directed, to which said company assented; that said bank, relying on said orders and instructions so given, and said company's assent thereto, advanced and loaned to said Gilman, solely upon the strength of the said orders, etc., \$1,500; that said company made payments to said bank as directed, and, upon the faith of such payments having been made, and that they would continue to be made, said bank made other advances and loans to said Gilman; that on the 3d day of April, 1882, while the orders and directions aforesaid were in force, it appeared that there was due to said Gilman, for board of employees of said company for the previous month of March, about the sum of \$1,500, which would be paid during said month of April; said bank, at Gilman's request, and relying solely upon the moneys to be paid to it by said company, again advanced and loaned to said Gilman the sum of \$1,500, having no other security for said loan than the payment to be made by said company as aforesaid; that, at the time of the service of the garnishee summons, said sum of \$1,500 was still unpaid, and said sum of \$1,495.88 was still in the hands of said company's officers, but held for said bank; and that the same was about to be paid over to it. Demands judgment for said sum of \$1,495.88.

Plaintiffs, answering the petition of the bank, admit that there is a contention between plaintiffs and said bank regarding the right of the money in the hands of the company; admit that there was due from the company to Gilman, for the month of March, at least the

sum of \$1,500, and that the company has answered as garnishee in the action, and deny specifically all other allegations.

Judgment in favor of plaintiffs against Gilman upon the pleadings. Trial to a jury of the issues joined between plaintiffs and said bank as intervenor, and judgment thereon in favor of intervenor against the plaintiffs for its costs. From this judgment plaintiffs appeal.

The claim of appellee to the money in controversy rests upon a claimed equitable assignment of the money due Gilman from the railroad company for the board of its employees for the month of March, 1882, under an agreement between said Gilman and said company; and also upon the claim that, at the time of the service of the garnishee summons on the company, the officers of the company held this money as the money of and for the bank. Appellants' claim to the money rests upon the rights of an attaching creditor, and is based upon the claim that no interest in the March indebtedness of the employees of the railroad company passed to the bank by reason of the transactions between Gilman and the bank.

What was the transaction between Gilman and the bank in relation to the loaning of money by the bank to Gilman? The witness Gilman testifies that about the 1st of December, 1881, he made an agreement with the bank to obtain money due him from the railroad company by turning over to the bank money which would be due him on the following pay-day; that he got about \$1,500 from the bank; that that sum was due him from the company at the last of the month; that he showed to Mr. Hanna, the cashier of the bank, how much the board-bills amounted to on their face, and that these bills would be likely to be paid about the 20th of the month; that this arrangement was renewed again in January; that in January he told Mr. Hanna that he had to go south on account of his wife's illness, and that

he wished to have this arrangement continued until his return; that his brother, C. S. Gilman, was fully authorized to act as his agent during his absence, and that his brother would go on and do every month just as he had done; that Mr. Hanna wished him to notify the pay-master of the fact that he was going away, and the arrangement was to be continued during his absence, and he said he would do so; that, before he went south, he saw the pay-master, and, in speaking about this arrangement with the bank, the pay-master said he would continue to do as he had done until further orders; that he returned from the south in April. The testimony of the witness Hanna corroborates the testimony of the witness Gilman, and further shows that Gilman told him how much the pay-rolls were after they were made up; that on the 3d day of April the bank loaned Gilman \$1,500; that the money was to be paid during the month; that witness thinks it was for the March indebtedness; that there was no difference between this transaction and previous ones; that the bank got the checks made by the company to Gilman each and every month until April.

We have given the substance of the evidence relating to the transaction of April 3, 1882, between the bank and Gilman, and relating to the facts leading up to that transaction.

In relation to the carrying out of the different arrangements made between Gilman and the bank, the witness Bush testifies that from November, 1881, to April, 1882, he was employed as clerk in the pay-master's office of the Denver & South Park Railroad. That Horace W. Fisher was pay-master, and witness' duties were to assist the pay-master in general. That each head of departments sent in to the time-keeper the time of the men in his employ. That Gilman sent in to the time-keeper any stops he might have against any of the employees. The time-keeper made up his pay-roll, and put against the several parties named the stops as required by Gil-

man; that is, he noted how much was to go from each man to Gilman. These rolls, after they were made up, were forwarded to the auditor at Omaha, examined, and checks made and signed for the several amounts, and the pay-rolls and checks were returned to Denver to the pay-master. When a part of a man's wages had been stopped for his board, a check would come for the amount due him, less the amount of "stop" for board. The amount of the stop would come in a check in favor of Gilman. That he heard Gilman say to the pay-master that he had made an arrangement with the bank to get money on the checks coming to him, and he desired to give the pay-master an order to pay over to the bank, from time to time, the checks coming to him. That, early in the spring, Gilman, who was going down south, came to the office, and told Mr. Fisher that he wanted to give him a continuous order to pay over to the bank the checks regularly, and said that he had authorized his brother Charles Gilman to receive them, and deliver them to the bank, and indorse his name on the back of them. That there were four or five payments before the last payment. That, upon Gilman's order, the pay-master transferred the checks to the bank. They were payable to the bank by Gilman's indorsement. The checks were indorsed by Gilman, and then transferred to the bank by Fisher, and the bank's receipt taken. That he was present when payment was being made in April. That Charles Gilman called for the Gilman checks. That the Gilman checks had been marked paid on the roll, and countersigned by the pay-master, and all but two or three of them had been indorsed by Charles Gilman for his brother Ben when the garnishee notice came into the car. That the transaction in April was conducted as all their payments were previous to that order.

The witness Dunlevy testifies that he was connected with the City National Bank, and had been for three years and over; that he knew of checks being made pay-

able to Benjamin M. Gilman by the South Park Railroad Company, which checks came to the bank during the months of December, January, February, March and April. They were sent to the bank by Mr. H. W. Fisher, or brought by him personally. At no time while the bank was carrying Gilman did he or his brother bring these checks.

We think the evidence shows an equitable assignment by Gilman to the bank of the March indebtedness of the railroad company to Gilman, and that the railroad company had notice of such assignment, and assented to it. The assignment of the indebtedness for the months of November, December, January, February and March was a separate and distinct transaction for each month. At the time of the assignment, in each case, the indebtedness assigned existed, and the amount had been ascertained.

There can be no question but that an assignment can be made of such indebtedness, and that, under our statutes, the assignee takes a legal interest in the matter assigned. *Patton v. Coen and Ten Broeke C. M. Co.* 3 Colo. 265; Pom. Eq. Jur. 1271, 1273. An assignment of a debt may be by parol, and may be inferred from the acts and conduct of the party. 1 Pars. Cont. 229.

In the argument much attention was given to the question of notice to the railroad company of the transfer of the indebtedness by Gilman to the bank. So far as the rights of the parties to this action to the money in controversy are concerned, the question of notice to the company is wholly immaterial. The rights of the parties to this action must be determined by the character of the transaction between Gilman and the bank in relation to this money. If, as between Gilman and the bank, the bank became the owner of the indebtedness, Gilman's creditors could not obtain any interest therein by attachment. The creditor can only reach the interest of the debtor, and after the assignment to the bank Gilman had no interest in this indebtedness. Pom. Eq. Jur. 694, 697,

700. The interest assigned is regarded as property. Pom. Eq. Jur. 1280, note 2. The notice to the debtor, in case of an equitable assignment, is to bind the debtor. In this case, the railroad company, as debtor, had notice and acted upon the notice. The fact that the checks were drawn to Gilman by the railroad company does not change the ownership of the indebtedness. Gilman having assigned his interest therein to the bank, and the railroad company having notice of such assignment, and having assented thereto, could not re-invest Gilman with the ownership by drawing checks for the amount to Gilman. A payment by the company to Gilman would not, under the circumstances of this case, have released the company from its liability to pay the bank. It is plain, from the conduct of Gilman and the company, that the drawing of the checks to Gilman, and getting his indorsement thereon, was a matter relating to the manner of making payment to the bank.

Appellants' counsel cites the fourth subdivision of section 1521 and sections 1523 and 1527 of the General Statutes. We do not think the assignment by Gilman to the bank of the indebtedness of the railroad company to him comes within the statute of frauds.

Under our view of the law applicable to this case, under the evidence, the instruction given to the jury by the court below was more favorable to appellants than they had a right to ask. The instructions left it to the jury to determine from the evidence, not only whether there was an arrangement between Gilman and the bank by which Gilman turned over the indebtedness due him for March, and whether Gilman had ordered the railroad company to pay this money to the bank, but whether Gilman had indorsed the checks, and delivered them to the railroad company, to be delivered by it to the bank before the service of the garnishee summons. The jury were not instructed to find for the bank, unless they found in the affirmative all these facts, and the verdict

for the intervenor amounts to such an affirmative finding. We see no error in the instructions of which appellants can complain.

Plaintiffs asked the court to instruct the jury "that the checks drawn by the railroad company to pay Gilman on March pay-roll of 1882 were never delivered by the company to Gilman or the bank, but the money called for on the same had been paid over, and is now in this court, to be disposed of under its order." The refusal to give this instruction is assigned for error. We think there was evidence sufficient to show a delivery of the checks by Gilman to the pay-master, to be delivered by him to the bank, if such delivery had been necessary to vest the ownership of the money in the bank, and to have given the instruction asked would have been error.

Plaintiffs further asked the court to instruct the jury that the bank "claimed the right to the money by virtue of an assignment of it by Gilman to itself, in and by virtue of a certain written order made by Gilman, and delivered to the South Park Railroad Company in January, 1882. The order is not produced, neither are the contents before you as evidence. Therefore you will not consider what its purport was, and on this branch of the case the intervening claimant has failed to make a case, and you should find for the plaintiffs." The refusal to give this instruction is assigned for error. The instruction asked for is misleading, in that the jury might assume that they were instructed that the bank claimed the money by an assignment from Gilman by virtue of a written order made by Gilman to the railroad company. It entirely ignores all the testimony relating to the transactions between Gilman and the bank. By what right the intervenor claimed the money was a fact for the jury to determine from the evidence. The instruction assumes a fact not proven. There was no evidence of such written order. The instruction was properly refused.

Plaintiffs asked the court to instruct the jury that "if

they believe from the evidence that Gilman attempted in January, 1882, to give an order upon the Denver & South Park Railroad in favor of the City National Bank, to pay whatever money there might thereafter become due for the board of the employees of the said South Park Railroad Company to the bank until such order was revoked by Gilman; and that afterwards, and in April, 1882, the bank loaned \$1,500 on the strength of such order given it in January previous,—such order was not an assignment, in law or in equity, of the respective sums of money due from the boarders to Gilman, or from the railroad company to Gilman, as against the attachment of the plaintiffs, and you should find the issues for the plaintiffs Chamberlin & Aicher, as against the said bank.” The instruction asked for is clearly erroneous. It seeks to determine the whole case upon an attempt to give a continuous order in January. That order might be held invalid for all purposes, and still, under the evidence, having no reference to that order, the jury might say that it was sufficient to show an assignment of the March indebtedness.

We find no error in the refusal to give instructions asked by plaintiffs.

The first, second, third, fourth and fifth assignments of error are based upon the admission of testimony relating to the notice given by Gilman to the railroad company of his assignment to the bank of the indebtedness of the company to him, and the custom of the company in turning over checks upon order of the payees thereof. As the notice to the company in no way affected plaintiffs’ right to the money in controversy, the testimony was immaterial, but, under the evidence and the instructions given by the court, its admission could not have prejudiced the appellants.

The court refused to allow plaintiffs to prove by witness Chamberlin “that, on or about the 15th or 17th of April, 1882, Gilman told witness that he was sorry that

he could not pay the bill; that he was expecting some \$1,800 of the railroad company in a day or two, or the next pay-day; and that he was going to take that money, and divide it up between the plaintiffs, John D. Best & Co., and Struby, Estabrook & Co." There was no error in such refusal. Whatever Gilman might say after he had assigned his interest in the March indebtedness could not affect the interest of his assignee. Aside from this, there is nothing in the offer to show that the money he expected from the railroad company was the money due him for board of the employees of the company, but the amount spoken of would indicate that it was not the same. Judgment should be affirmed.

MACON, C., concurs. STALLCUP, C., dissents.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment is affirmed.

Affirmed.

TOWN OF IDAHO SPRINGS V. WOODWARD.

Appeal from County Court, Clear Creek County.

THIS was a case brought before a justice of the peace of Clear Creek county by Woodward, appellee, against the town of Idaho Springs, for damages to his real estate occasioned by water leaking from the flume of the Sunshine Mining Company, built by it in the street of the town by leave of the town by ordinance. Judgment by the justice against the town, from which the town appealed to the county court, and judgment there against the town, from which the town appealed to this court.

Messrs. J. N. SMITH, T. J. CANTLON and J. E. ROCKWELL, for appellant.

Mr. T. B. BRYAN, for appellee.

STALLCUP, C. The case is submitted upon the question, Is the town liable for that it had granted leave to the Sunshine Mining Company to build a flume in the street? The decision in the case of *City of Denver v. Bayer*, 7 Colo. 113, is decisive that the town is not liable.

Judgment should be reversed and the case remanded, with directions to the county court to dismiss the action.

MACON and RISING, CO., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the cause is reversed and remanded, with directions to the court below to dismiss the action.

Reversed.

TOWN OF IDAHO SPRINGS V. FILTEAU.

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A town which, exceeding its corporate powers, grants permission to a mining company to build a flume in its streets, does not thereby become liable for damage done to adjoining premises by the water leaking from the flume on to such premises.

Appeal from County Court, Clear Creek County.

THIS was an action brought before a justice of the peace in Clear Creek county by Kate Filteau against the town of Idaho Springs, for damages to her real estate occasioned by the water leaking from the flume of the Sunshine Mining Company, built in the street of the town of Idaho Springs by said company, by leave of the town expressed by ordinance. Kate Filteau, the plaintiff, recovered judgment for \$130. From this judgment the town appealed to the county court of Clear Creek county. Trial there by a jury. Verdict for plaintiff for \$225. Motion for a new trial by defendant, denied by the court, and judgment rendered on verdict. Exceptions duly reserved, and appeal to this court by defendant.

One of the errors assigned presents the question, Is the town liable on such demand? At the time of the trial of this case in the county court, the decision in the case of *City of Denver v. Bayer* had not been made. That decision, being made soon afterwards, seemed to settle the law against the right of the plaintiff to recover against the town on such demand; whereupon the counsel for the plaintiff, Kate Filteau, made the following statement in this court: "This case, in our opinion, turns upon the question of the liability of the municipal corporation to a private individual, where the act complained of is not within the power or authority of the corporation as conferred in its charter or by statutes." "The case at bar was tried in the lower court in May, 1883. The attorney who tried the case followed, in his conduct of the trial and preparation of the case, the decisions of the supreme court of Illinois, where a municipal corporation was held liable for acts similar to the one complained of in this case. Since the trial of this cause in the lower court, this court, in the case of *City of Denver v. Bayer*, 7 Colo. 113, has held the contrary to be the law. We fear there is no substantial distinction between this case and the one at bar, but, as the case is here, we will submit it."

Messrs. J. N. SMITH and T. J. CANTLON, for appellant.

Mr. T. B. BRYAN, for appellee.

STALLCUP, C. The case is submitted upon the question, Is the town liable for that it had granted leave to the Sunshine Mining Company to build a flume in the street? The decision in the case of *City of Denver v. Bayer*, 7 Colo. 113, is decisive that the town is not liable.

The judgment should be reversed and the case remanded, with directions to the county court to dismiss the action.

MACON and RISING, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment is reversed and the cause remanded, with directions to the court below to dismiss the action.

Reversed.

HOOPES, ASSIGNEE, V. COLLINGWOOD ET AL.

In an action on a promissory note by an indorsee, where the defense was that the interest clause in the note, when delivered to the payee, read as follows: "With interest at — per cent. per — from — until paid," and that the indorsee subsequently, without authority, filled up the blanks so as to make the note read, "With interest at two per cent. per month from date until paid," *held*, on demurrer to the answer, that the delivery of the note with such blanks did not impart authority in the holder to fill them, and that such insertions made by the indorsee without the knowledge or consent of the maker rendered the note void.

Appeal from District Court, Summit County.

Messrs. BEREMAN and JONES, for appellant.

Messrs. BULLICK and DICKSON, for appellees.

STALLCUP, C. This is an action upon a promissory note by the plaintiff (appellant) against the defendants (appellees). The complaint states that plaintiff was assignee of the insolvent corporation, the Bank of Breckenridge, to pay its debts with its property; that defendants upon the 17th day of February, 1881, made and delivered for value to one W. W. Goodrich their promissory note at eleven days for \$744.12; that Goodrich, for value, before maturity, sold and transferred this note to the Bank of Breckenridge, which bank afterwards transferred and assigned to plaintiff for purpose aforesaid; that the note is due and unpaid. Prays judgment for the amount and costs. The answer, all the defendants answering jointly, states that they made to Goodrich their certain promis-

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sory note bearing date of February 17, 1881, whereby they promised to pay him eleven days thereafter said sum of \$744.12, but deny it was for value, and allege it was for accommodation, and deny receipt of any consideration; and further say they made the note in writing in these words and figures:

“\$744.12. BRECKENRIDGE, COLO., February 17, 1881.

“Eleven days after date we promise to pay to the order of W. W. Goodrich seven hundred and forty-four and 12-100 dollars, with interest at — per cent. per — from — until paid.

“E. J. COLLINGWOOD.

“GEO. H. BRESSLER.

“R. B. STAPP.

“W. J. SWIFT.”

That this note was delivered to said Goodrich in those words and figures. That said Goodrich indorsed said note over to the bank, but they have no knowledge, etc., as to whether or not the bank purchased said note or paid value. That, at the date of this transaction, one Allen was a director, stockholder, and the cashier of said bank, and then and there materially altered said note, and changed defendants' liability, by inserting the word “two” between the words “at” and “per cent.,” the word “month” between the words “per” and “from,” and the word “date” between the words “from” and “until;” thereby making the note read, “with interest at two per cent. per month from date until paid.” That such alteration was without the knowledge or consent of defendants, and was a forgery and fraud upon the defendants, and the note was thus rendered null and void. That they repudiated this alteration, and refused to pay, as soon as they learned that it was altered. Plaintiff demurred for that the facts pleaded in the answer were not sufficient to constitute a defense. This demurrer was argued, and the court overruled the same; and, the plaintiff standing upon and abiding by his demurrer, judgment was rendered for defendants and against the

plaintiff, to which plaintiff excepted. The plaintiff then appealed to this court.

The demurrer admitted all the facts well pleaded in the answer. So we have the case. The note was made and delivered to payee as shown above, before maturity. It was indorsed by the payee to the bank, and was then and there filled up by the bank, without the knowledge or consent of the makers, so that it reads, "with interest at two per cent. per month from date until paid." The questions presented by the assignment of errors and the argument of counsel here are:

1. Does such a note, with such blanks, thereby carry authority to the purchaser thereof to fill the blanks in the manner here shown, whereby the rate of interest is changed from the legal rate, viz., ten per cent. per annum, to twenty-four per cent. per annum? We answer not. *Rainbolt v. Eddy*, 34 Iowa, 440; *Bank v. Stowell*, 123 Mass. 196; *Holmes v. Trumper*, 22 Mich. 427.

2. Is the note vitiated and avoided by such change in its terms by the purchaser, without the knowledge or consent of the makers? We answer that it is, for thereby it ceases to be the promise they made, and the effect is the extinguishment of the promise. 1 Greenl. Ev. § 565; *McGrath v. Clark*, 56 N. Y. 35; *Inglish v. Breneman*, 5 Ark. 377; *Coburn v. Webb*, 56 Ind. 96.

The judgment in the case ought to be affirmed.

RISING and MACON, CO., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment is affirmed.

Affirmed.

EDGAR GOLD & SILVER MINING CO. v. TAYLOR ET AL.

1. The cost bond required of non-residents before commencing suit, if tendered after action brought, even though before the motion to dismiss is interposed, comes too late.
2. The right to assign error on the denial of this motion is not waived by pleading over.

Appeal from District Court, Gilpin County.

The plaintiff, a corporation organized under the laws of the state of New York, brought this action against Fernando C. Taylor, one of the appellants, to determine the rights to possession of certain mining premises, in support of an adverse claim. The action was commenced on the 6th day of March, 1882. A cost bond was filed on the 20th day of April, and the summons served on defendant on the 22d day of April, 1882. On the 4th day of May following, the defendant filed a motion to dismiss the action on the ground that the plaintiff was not a resident of this state, and no cost bond was filed before the commencement of the action. The court denied the motion, to which ruling and order defendant duly excepted. On the 5th day of July, 1883, the Mitchell Mining & Milling Company made application to the court to be substituted as defendant in the action in the place of Fernando C. Taylor, which application was denied, but applicant was granted leave to join with said Taylor as defendant, the answer of said Taylor to stand as the joint answer of said joint defendants; and thereupon the Mitchell Mining & Milling Company entered an appearance in the action, and contested the same to final judgment. Replication filed by plaintiff to amended answer of defendants on the 7th day of July, 1883. Trial to jury, and verdict that plaintiff is entitled to the possession of certain portions of the premises in controversy, and is entitled to recover \$50 for surveys, plats and abstracts, and \$50 attorney's fees. Motion for new trial by defendants.

Motion denied, and judgment entered on the verdict, from which both defendants appeal. There is no appearance in this court by the appellee.

“Section 1. In all actions on office bonds for the use of any person, actions on the bonds of executors, administrators, or guardians, *qui tam* actions on any penal statute, and in all cases in law and equity where the plaintiff, or the person for whose use an action is to be commenced, shall not be a resident of this state, the person or plaintiff for whose use the action is to be commenced shall, before he institutes such suit, file, or cause to be filed, with the clerk of the court in which the action is to be commenced, an instrument in writing, of some responsible person, being a resident of this state, to be approved by the clerk, whereby such person shall acknowledge himself bound to pay, or cause to be paid, all costs which may accrue in such action, either to the opposite party or to any of the officers of such court; which instrument may be in form as follows: * * *

“Sec. 2. If any such action shall be commenced, without filing such instrument of writing, the court, on motion, shall dismiss the same, and the attorney for the plaintiff shall pay all costs accruing thereon. * * *

Mr. M. F. UFFORD, for appellants.

PER CURIAM. The first error assigned is that the court below erred in denying the motion of defendants to dismiss the action for want of the cost bond required by law. The motion is based upon the provisions of sections 1, 2, chapter 20, General Laws, page 189. The requirement of the first section is that the non-resident plaintiff shall, “*before he institutes such suit, file, or cause to be filed, with the clerk,*” etc., the cost bond therein specified and required; and section 2 declares that, if any such action shall be *commenced*, without filing the cost bond required by section 1, the court, on motion, shall dismiss

the same. This court has repeatedly held that this language is unequivocal, and leaves nothing to the discretion of the court. *Filley v. Cody*, 3 Colo. 221; *W. U. Tel. Co. v. Graham*, 1 Colo. 183; *Talpey v. Doane*, 2 Colo. 299. It follows that filing the bond subsequently to the commencement of the suit, and whether before or after the motion to dismiss is interposed, cannot avail the plaintiff. *Farnsworth v. Agnew*, 27 Ill. 42; *Sutro v. Simpson*, 14 Fed. Rep. 370.

The motion to dismiss was the first action taken by the defendant upon his appearance to the suit, and was in apt time. *Trustees v. Walters*, 12 Ill. 154; *Randolph v. Emerick*, 13 Ill. 346; *Robertson v. County Com'rs*, 5 Gilman, 565; *Roberts v. Fahs*, 32 Ill. 474; *People v. Cloud*, 50 Ill. 439.

The motion was in the nature of a plea in abatement; the defendant, by answering over, did not waive his right to assign for error the decision of the court overruling the motion. *Puterbaugh*, Pl. 150; *Delahay v. Clement*, 3 Scam. 201.

For this error the judgment of the court below must be reversed and the cause remanded, with a direction to the court below to dismiss the same.

Reversed.

KEESE ET AL. V. CITY OF DENVER.

1. Grants of powers to make local assessments are strictly construed and must be strictly followed.
2. A subsequent statute, revising the whole subject-matter of a former statute, and evidently intended as a substitute for it, although it contains no express words to that effect, must operate as a repeal of the former.
3. It is a general rule applicable to the corporate authorities of all municipal bodies, that when the mode in which their power on any given subject can be exercised is prescribed by the charter, the mode must be followed. The mode in such cases constitutes the measure of power.

10	112
12	506
12	603
10	112
17	217
10	112
26	194
28	196
10	112
16a	879
16a	880
16a	881
16a	882
10	112
18a	245
10	112
34	294
20a	369
10	112
35	491
36	421

4. An assessment under the statute authorizing the cost of sewers to be levied against property in a district according to area and not based upon value, benefits or improvements, *held* to be a valid assessment under the police power.
5. An objection that the assessments were not made by the city assessor as required by the charter, *held* to be an objection going to an irregularity that in no way affected the tax-payer.
6. The rule that one or more plaintiffs may bring suit in equity for the benefit of all others similarly situated or interested is well settled. Equity will assume jurisdiction in such cases to avoid a multiplicity of suits.

STALLCUP, C., dissenting.

Appeal from District Court, Arapahoe County.

THOMAS KEESE and seven others, plaintiffs, tax-payers of the city of Denver, filed a complaint to enjoin the sale of lands owned by them under an assessment for the building of a sewer, against the city of Denver and some of its officers, defendants. Judgment for the defendants, and plaintiffs appealed.

Messrs. MARKHAM and DILLON, for appellants.

Messrs. ROGERS and CUTHBERT and J. F. SHAFFROTH, for appellees.

RISING, C. This action was brought by the plaintiffs to restrain the sale of real estate described in the complaint, for the purpose of collecting an assessment placed thereon to pay for the construction of a sewer, constructed under the direction of the city council of the city of Denver. There are seven plaintiffs, and each has a separate interest in distinct portions of said real estate, and there is no joint interest of any of the plaintiffs in any portion of such real estate, and the same relief is asked for all other persons similarly situated and interested as for themselves. Demurrer to complaint for defect and misjoinder of parties plaintiff, and that complaint does not state facts sufficient to constitute a cause of action. Demurrer.

overruled, and, upon trial, judgment dismissing bill of complaint, from which judgment plaintiffs appeal.

There is no conflict in the testimony, and the objections urged against the validity of the sewer assessments, and appellees' answer thereto, are based upon the provisions of the charter of the city of Denver, approved April 16, 1877, and an amendment thereto approved February 19, 1879, and upon the following facts: On January 5, 1880, the council passed an ordinance adopting the system of drainage and limits of districts as shown on map of sewer districts prepared by the city engineer, so far as the same applies to district No. 2, as the system of sewers for said sewer district No. 2. On May 6, 1880, the following communication from the board of health was presented to, and adopted by, the city council: "Gentlemen: In accordance with the authority given to the board of health in section 3 of an act passed February 9, 1879, entitled 'An act to enable the city council to establish a system of sewerage,' we respectfully recommend as a sanitary measure the construction of district sewers as provided by ordinance. We further recommend that the district sewer on Sixteenth street be constructed this year from the main sewer on Wyncoop street to Curtis street; also that district sewer on Eighteenth street be constructed this year from the main sewer on Wyncoop street to Lawrence street." An ordinance establishing the Thirteenth-street sewer district, and providing for the construction of a sewer therein, was passed by the city council, and approved by the mayor, on the 6th day of March, 1882, and was duly published. A majority of the property holders resident in said district did not sign a petition for the construction of said sewer, but said ordinance recites that it is enacted "in accordance with the petition of the citizens" in said district. On July 5, 1883, the city council, by resolution, instructed the city engineer to compute the total cost of the sewer, including interest on warrants

already issued up to January 1, 1884, and including the cost of collecting the assessments; and on September 6, 1883, the city engineer reported to the city council the total cost of the sewer to be \$113,016.80, which report was adopted, and on the same day the city council, by resolution, instructed the city engineer to make a plat-book of said sewer, and report the same to the council for approval. On October 8, 1883, the city engineer presented to the council a book of plats, showing the area and tax of each lot or parcel of land in said sewer district, and the council by resolution adopted the assessments of sewer tax against lots and parcels of land in said district, as shown in said book of plats, subject to such changes and equalization as might thereafter be made by action of the council, and resolved that a committee of three be appointed as a board of equalization to hear and adjust complaints as to the assessment of sewer tax made against property in said district, and appointed as such committee, C. Gove, G. N. Billings, E. P. McPhilomy. Due notice of the time and place of the meeting of this committee was given, and the committee sat for five consecutive days, and on the 20th day of October, 1883, reported to the council that no complaints had been made as to the legality of the assessment or its manner of make-up, and recommended that the estimate of the engineer be made the assessments, and the lots assessed as per the accompanying abstract. On the same day the following resolution was adopted by the council: "Resolved, that the lots and parcels of lots mentioned in the abstract of lots and assessments accompanying the report of the committee be assessed at the sums therein mentioned, and that the abstract and plats be forwarded to the county clerk and recorder of Arapahoe county, with instructions to extend the assessments with other taxes upon the lots and parts of lots therein mentioned." The contract for the construction of said sewer was let on the 30th day of March, 1882.

All the questions presented by the briefs of counsel are raised by the issues made by the pleadings. The ordinance of March 6, 1882, for the establishment of the Thirteenth-street sewer district, and the construction of a sewer therein, recites that it was enacted in accordance with the petition of the citizens in said district. In their argument, counsel for appellants first attack the validity of the tax or assessments, upon the ground that the petition for the establishment and construction of said sewer was not signed by a majority of the property holders resident in said district, and that the board of health did not recommend the construction of such sewer, and that no recommendation of the board of health was approved by the city council. These objections are based upon the provisions of section 3 of the amendment to the city charter, approved February 19, 1879, which provisions are that "the city council shall cause sewers to be constructed in any district, whenever a majority of the property holders resident therein shall petition therefor, or whenever the board of health recommend the same as necessary for sanitary reasons, and said recommendation is approved by the city council." The evidence clearly shows that a majority of the property holders, resident in said district, did not petition for the construction of said sewer. To authorize the city council to act, under the provisions of said amendment, there must be a petition of property holders, or a recommendation of the board of health, as required by section 3, and a petition not complying with the requirements of said section did not authorize the council to act thereunder. The grants of powers to make local assessments are strictly construed, and must be strictly followed. *Merritt v. Portchester*, 71 N. Y. 309; *Allen v. Galveston*, 51 Tex. 302. Every material requirement of the charter must be strictly complied with before there can be any liability of adjoining lots for such work. *Massing v. Ames*, 37 Wis. 645; *Pound v. Chippewa Co.* 43 Wis. 63; *Columbus v.*

Story, 35 Ind. 97; *Covington v. Casey*, 3 Bush, 698; *In re Sharp*, 56 N. Y. 257; *Kyle v. Martin*, 8 Ind. 34.

The general rule is laid down by Judge Dillon in his work on municipal corporations (section 800), and is as follows: "Where the power to pave depends upon the *assent or petition of a given number or proportion* of the proprietors to be affected, this fact is jurisdictional, and the finding of the city authorities or council that the requisite number had assented or petitioned is not, in the absence of legislative provision to that effect, conclusive; and the want of such assent makes the whole proceeding void, and the non-assent may be shown as a defense to an action to collect the assessment, or may, it has been held, be made the basis for a bill in equity to restrain a sale of the owner's property to pay for it." The ordinance of March 6, 1882, cannot be sustained upon the petition therefor.

Was the action of the council in passing the ordinance of March 6, 1882, based upon the recommendation of the board of health? Had the ordinance, directing the construction of the sewers in question, been silent as to the ground upon which the council acted, more difficult questions would be presented than are presented by the facts in this case. The ordinance is not silent on this subject. It expressly declares the action of the council to have been in pursuance of a petition of property owners. Such action shows, not only a total absence of any evidence of an intention to base it upon such recommendation, but positive proof that the action was not induced thereby. We are therefore not at liberty to assume that the action of the council was in pursuance of a recommendation of the board of health, or that the council intended by such action to express a judgment of approval of such recommendation. Not only does the unqualified declaration of the council clearly and unequivocally state the exact ground upon which that body did act, but the facts strongly corroborate the view that the council did not think of the rec-

ommendation of the board of health, or attempt to act under it. The recommendation was made to a preceding council, nearly two years prior to the adoption of the ordinance in question. The Thirteenth-street sewer district created by this ordinance is not the district to which the ordinance referred, but a new district carved out of the old one. The ordinance referred to in the recommendation of the board of health adopted a system of sewerage for district No. 2, as marked out on a certain plat prepared by the city engineer, but did not authorize the construction of any of the sewers thus indicated.

An examination of the plats showing the system of sewers for district No. 2, and the system of sewers in the Thirteenth-street sewer district, shows that these systems are so radically different that the construction of sewers in the new district cannot be held to be a construction of sewers as provided by the ordinance establishing a system of sewerage for district No. 2, to which the recommendation related. It is therefore literally true that the board of health could not have recommended the construction of sewers as they were afterwards authorized by the ordinance of March 6, 1882. The action of the council not having been based upon the recommendation of the board of health, or had in pursuance thereof, and the facts showing that such recommendation could not apply to the sewers constructed under the ordinance of 1882, it follows that the recommendation of the board of health has no bearing upon the case. Whether its terms complied with the statutory requirements, or whether the council, by using the word "adopted," expressed an approval thereof, are matters of no importance to the present inquiry. The conduct and language of the council, in adopting the ordinance of March 6, 1882, as well as all the facts in the case, show clearly, either that the council had no knowledge of the recommendation of the board of health, and the action of the council thereon in 1880, or that such recommendation was ignored. For the fore-

going reasons, the sufficiency of the recommendation of the board of health will not be considered.

It is claimed by counsel for appellees that the power to establish and construct sewers was vested in the city council by the charter of 1877, and that the action of the city council in relation to the construction of the sewers in the Thirteenth-street sewer district can be sustained under the provisions of that charter, defining the powers of the city council, notwithstanding any failure of the council to comply with the provisions of section 3 of the amendment of 1879 to the charter, relating to a petition by property holders, or recommendation of the board of health. The argument in support of this position is that the city council, by the charter of 1877, was authorized to construct sewers, whenever, in the judgment of the council, such construction was necessary, and that the amendment of 1879 was not a limitation upon the power conferred by the charter; that the provision in relation to the construction of sewers upon the petition of a majority of the property holders resident in any district should be held to be a delegation of power to such property holders to compel, by petition, the city council to exercise the power granted by the charter; that the amendment of 1879 does not in terms repeal the provisions of the charter of 1877, granting to the city council the power to construct sewers, and that if the two statutes can be construed together so as to give effect to each, this should be done, and this upon the well-settled principle of law that a repeal by implication is not favored by the courts. A statute is, by implication, a repeal of all prior statutes so far as it is contrary and repugnant thereto, and upon this principle a statute is impliedly repealed by a subsequent one, revising the whole subject-matter of the first.

Does the statute of 1879 revise the whole subject of the establishment and construction of sewers, as found in the charter of 1877? A comparison of the statute of

1879 with the statute of 1877 is one of the means to be used in determining this question. The charter of 1877 provides (section 40) that "the city council shall have, subject to the provisions hereinafter named, the general management and control of the finances, and all property, real, personal and mixed, belonging to the corporation, and shall likewise have power within the jurisdiction of the city, by ordinance not repugnant to the constitution of the United States or the constitution of the state of Colorado — *First*, to establish a system of sewerage; * * * *sixth*, to open, alter, abolish, widen, extend, establish, grade, pave or otherwise improve and keep in repair streets, avenues, lanes and alleys, sidewalks, drains and sewers." We think the foregoing quotations from the charter of 1877 contain all the provisions conferring express power upon the city council in relation to the establishment and construction of sewers.

The act of 1879 is entitled "An act to amend an act entitled 'An act to reduce the law incorporating the city of Denver, and the several acts amendatory thereof, into one act, and to revise and amend the same so as to enable the city council to establish a system of sewerage.'" Section 1 provides that the city council of the city of Denver have the right to establish and maintain a sewer system, which shall be divided into three classes, viz., public, district, and private sewers. Section 2 provides for the establishment and construction of public sewers, and for the payment for such construction. Section 3 provides for the establishment and construction of district sewers, and for the payment of the cost of such construction. Section 4 relates to private sewers; to manner of contracting for the construction of sewers; to bonds and sureties thereon to be given by contractors; to provisions of ordinances relating to construction of sewers as to making an appropriation to pay for such construction; to the right of any citizen and tax-payer to make complaint to the city council that any work is being done

contrary to contract, or that the work done or material used is imperfect, and providing for a hearing upon such complaint, and a determination thereof by the council. Section 5 provides that no public sewer shall be constructed until the question of such construction shall have been submitted to a vote of such tax-payers of the city as are legal voters, and approved by a majority thereof. By the charter of 1877, the city council was empowered to *establish a system of sewerage*, and to *establish sewers and to keep them in repair*. The charter conferred upon the council the naked power to act in the premises, but made no provision for the manner in which the power should be exercised. The statute of 1879 was enacted to cure this defect, by a revision of the whole subject-matter, the object of the enactment being declared in the title to be "To enable the city council to establish a system of sewerage." By section 1 of the law of 1879, the city council was empowered to establish and maintain a sewer system. The power so conferred is equal in extent to the power conferred by the charter, and must have been intended by the legislature to take the place of the provisions of the charter. The law of 1879 not only confers upon the city council the power to establish and maintain a sewer system, but it provides how such power shall be exercised. The new statute covers the whole subject of the old one, and we think it must be held to be a substitute for it.

In Sedg. St. & Const. Law, 100, note, the author says: "If two statutes relate to the same subject-matter, though in terms not repugnant or inconsistent, if the later one is plainly intended to prescribe the only rule that shall govern, it will repeal the earlier." *State v. Conkling*, 19 Cal. 501, to same effect. The statute of 1877 and the statute of 1879 each confer the same general power upon the city council, but the statute of 1879 prescribes the only rule that shall govern in the exercise of that power.

In *Bartlet v. King*, 12 Mass. 537, 545, it was held that

“a subsequent statute, revising the whole subject-matter of a former one; and evidently intended as a substitute for it, although it contains no express words to that effect, must, on the principles of law, as well as in reason and common sense, operate to repeal the former.”

The rule that a statute which appears to cover the whole subject-matter of a former statute is a repeal of the former is laid down in *United States v. Tynen*, 11 Wall. 95; *Weeks v. Walcott*, 15 Gray, 54; *Nichols v. Squire*, 5 Pick. 168; *Swann v. Buck*, 40 Miss. 268; *Board Com'rs v. Potts*, 10 Ind. 286; *Pierpont v. Crouch*, 10 Cal. 315. We think the statute of 1879 is a substitute for the provisions of the charter of 1877, relating to the same subject, and that the action of the city council must be governed wholly by the provisions of the statute of 1879, and that the council has no power to act in the construction of sewers except as provided in that statute. The statute having prescribed how and when the council shall act, it has no power to act in any other or different manner.

It is said by Judge Field, in *Zottman v. San Francisco*, 20 Cal. 96-102, that “the rule is general, and applies to the corporate authorities of all municipal bodies, that where the mode in which their power on any given subject can be exercised is prescribed by their charter, the mode must be followed. The mode in such cases constitutes the measure of power.”

It is urged by counsel for appellees that plaintiffs are estopped from now questioning the legality of the assessment, because they allowed the work to progress to completion without making any objection. The legality of the assessment is attacked upon the ground that the city council was not authorized to cause the sewer to be constructed, and hence not authorized to levy an assessment to pay for its construction. The objection goes to the origin of the proceedings and is jurisdictional. The principles of estoppel have no application to the facts in this

case. *City of Chicago v. Wright*, 32 Ill. 192; *In re Sharp*, 56 N. Y. 256.

The fifth objection made by the appellants is that the assessments are illegal, in that they are not based upon value, benefits or improvements. This raises the question of the validity of the provision of the statute authorizing the cost of sewers to be assessed against the property in the district according to area. The doctrine announced in *Palmer v. Way*, 6 Colo. 106, is decisive of the question. It was there held that an assessment of the cost of a sidewalk upon frontage was a valid assessment under the police power, and the province of the police power was held to be "the preservation of order, and the making of such rules and regulations as shall be conducive to the health, comfort and protection of society, and not primarily the raising of revenue." The sewer assessments are within this power. *Cooley, Tax'n*, 399.

The sixth objection made by appellants is that assessments were not made by the city assessor as required by the charter. This objection goes to an irregularity that in no way did or could affect the rights of the tax-payer. The cost of the sewer is to be ascertained by the city engineer, and the assessment of such cost upon the property does not call for the exercise of judgment or discretion, but is made upon an arbitrary mathematical calculation. We do not think this objection should be sustained.

The ruling of the court below upon the demurrer to the complaint being favorable to appellants, their appeal does not necessarily require an expression of opinion upon that ruling; but as counsel for both appellants and appellees have argued the questions presented by the demurrer at considerable length, we will, without going into a review of the arguments made and authorities relied upon, state our conclusions upon the questions presented. The two grounds of the demurrer may be treated unitedly. Mr. Pomeroy, in his able treatise on Equity

Jurisprudence, has collated all the important cases upon the question of equity jurisdiction in cases of this character, and after an exhaustive review and comparison of the cases, has expressed his conclusions, and from which we quote the following: "Under the greatest diversity of circumstances, and the greatest variety of claims arising from unauthorized public acts, private tortious acts, invasion of property rights, violation of contract obligations, and notwithstanding the positive denials by some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no 'common title,' nor 'community of right' or of 'interest in the subject-matter,' among these individuals, but where there is, and because there is, merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body."

1 Pom. Eq. Jur. § 269. Equity assumes and exercises jurisdiction in cases of this character in order to prevent a multiplicity of suits. 1 Pom. Eq. Jur. § 260. The rule that one or more plaintiffs may sue for the benefit of all others similarly situated and interested is well settled, and in some states it is held that an allegation of this kind is necessary to confer equity jurisdiction. *Bull v. Read*, 13 Grat. 78; *Kennedy v. City of Troy*, 14 Hun, 308; *Wood v. Draper*, 24 Barb. 187; *McClung v. Livesay*, 7 W. Va. 329. The demurrer was properly overruled. The judgment should be reversed.

I concur: MACON, C.

I dissent: STALLCUP, C.

PER CURIAM. For the reasons assigned in the foregoing opinion, that the city council of the city of Denver

was without jurisdiction to cause the construction of the sewer in question, the conclusion arrived at in the foregoing opinion is approved, and the decree of the district court reversed and the cause remanded.

ELBERT, J., did not sit in this case.

Reversed.

CITY OF LEADVILLE V. MATTHEWS.

10	125
7a	450

It is not necessary that the annual appropriation ordinance or bill, required by statute of a city, specify each particular office and the exact sum to be paid the incumbent thereof.

Appeal from the District Court, Lake County.

Mr. C. H. WENZELL, for appellant.

Mr. JOHN MURPHEY, for appellee.

HELM, J. Matthews brought suit to recover for services rendered as street commissioner of the defendant city. Judgment was duly entered in his favor for the sum of \$400. But a single question is presented upon this appeal, viz.: Does the evidence show that the preceding city council made such an appropriation as is required by law for the payment of the street commissioner's salary during the fiscal year, when plaintiff acted in that capacity?

The annual appropriation bill for the year mentioned is before us. It recites a total appropriation of \$125,000 to meet the entire municipal expenses. This sum was, by the bill, subdivided into appropriations for the following specific objects or purposes, to wit, "salary fund," "streets," "fire," "gas," "interest" and "contingent expenses." This, we think, so far at least as the question at bar is concerned, a sufficient compliance with section 3326 of the General Statutes, upon which appel-

lant relies. It is, in our judgment, not necessary that the annual appropriation ordinance or bill specify each particular office, and the exact sum to be paid the incumbent thereof.

The street commissioner of Leadville is elected by the city council to serve for a definite period, unless sooner removed. His duties are defined by ordinance. By ordinance, also, or by resolution, a regular salary is provided for, and the amount thereof is fixed. He is an officer of the city, and, for aught that appears in the record before us, is entitled to be paid out of the "salary fund." The appropriation bill apportioned \$65,000 to this fund, and at the time plaintiff made demand for his pay, upwards of \$5,000 remained therein unused.

The district court committed no error in ruling upon the matter complained of, and its judgment will be affirmed.

Affirmed.

REYNOLDS V. LARKINS.

1. Appeals from judgments of justices of the peace in cases of forcible entry or unlawful detainer lie to the county court.
2. The territorial jurisdiction of justices of the peace in these actions is co-extensive with their respective counties.

Error to County Court, Arapahoe County.

THIS suit was brought before a justice of the peace under the forcible entry and detainer act. The premises sought to be recovered were not situate within the justice's precinct, nor was defendant a resident of such precinct. The cause of action, if any, accrued in another precinct, which had a duly-qualified and acting justice. Defendant made a special appearance, and moved to dismiss for want of jurisdiction over the subject-matter. The motion was overruled, default entered against de-

fendant, and the cause tried. An appeal was then taken to the county court, and defendant renewed in writing his plea to the jurisdiction. The county court allowed the plea, and dismissed the action. From this judgment of dismissal the present appeal is taken.

Messrs. F. J. MOTT, HARMON and COVER, and MARKHAM and DILLON, for plaintiffs in error.

HELM, J. A preliminary question is fairly presented by the record before us, viz.: Under our statutes relating to the subject, is there any appeal *to the county court* from judgments of justices of the peace in forcible entry or unlawful detainer actions?

Section 13 of the forcible entry and detainer act reads as follows: "Hereafter, in all cases of forcible entry and detainer, or forcible or unlawful detainer, tried or determined in any county court, or before any justice of the peace, either party may take an appeal to the district court of the proper county in the same manner and during the same time that is now provided by law for taking appeals from justices of the peace in other cases. * * *" The act mentioned does not authorize an appeal in this class of cases from justices of the peace to the county court. When the territory of Colorado became a state, the provision above quoted, having been previously enacted, continued in force. It was incorporated into the General Laws of 1877, and has remained without re-enactment to the present time. In 1877 the legislature adopted a statute reading as follows: "All appeals from judgments of justices of the peace, both in civil and criminal actions, shall be taken to the county court of the same county, and no appeal shall lie from a judgment of a justice of the peace in any cause, civil or criminal, to the district court." Gen. Laws, § 1599; Gen. St. § 1978.

The question stated at the beginning of this opinion

resolves itself into the following: Did the latter provision operate to repeal so much of section 13 of the forcible entry act as directs that appeals from justices of the peace, in actions under that act, shall be taken to the district court, and did it authorize such appeals to be taken to the county court instead?

In the *first* place, we observe that the latter section is a subsequent statute, having been adopted several years after the passage of section 13 of the forcible entry act. *Secondly*, the act in which this section appears is an independent enactment. It does not purport to be *amendatory* of any existing statute. It is entitled "An act in relation to the jurisdiction of justices of the peace, and the practice in justices' courts." The argument, therefore, that it was the intention to simply amend the act in relation to justices and constables, and that for this reason the provision in question should be applied alone to suits provided for in that act, is entitled to but little weight. *Thirdly*, this provision, besides being expressed in general and comprehensive terms, *also contains negative words*. It not only declares that "all appeals from judgments of justices of the peace, both in civil and criminal actions, shall be taken to the county court," but it also expressly asserts that "no appeal shall lie from a judgment of a justice of the peace in any cause, civil or criminal, to the district court." The language used expresses a clear legislative intent to have all appeals in actions, *regardless of their nature*, thereafter taken from the justices to the county court. The general character of the two statutes under consideration, and the repugnancy of their language, in so far as it specifies the court to which these appeals shall be taken, forbid an interpretation allowing the earlier to stand wholly unmodified; and, applying well-known rules of statutory construction, we must give an affirmative answer to the question propounded. Sedg. St. & Const. Law, 96 *et seq.*, and notes; Potter's Dwar. St. 154 *et seq.*, and notes.

The right of appeal from judgments of justices of the peace in these actions remains by virtue of said section 13. The repealing statute does not interfere with this right, or the procedure provided for its exercise. It simply changes the forum in which such appeals shall be tried, by substituting in relation thereto in the forcible entry provision the word "county" for the word "district."

The proposition that forcible entry and unlawful detainer causes are special proceedings, and not actions, we shall not consider at length. It is true they are statutory remedies, and it is also true that, in some respects, the prescribed procedure differs from that governing the ordinary civil action under the code. But they are referred to in that instrument (section 267) as actions, and are frequently thus named in the forcible entry act itself. Section 1236, General Laws, speaks of them as "the *action* of forcible entry and detainer, or unlawful detainer." Section 1248 reads: "Any *action* of forcible entry and detainer, or unlawful detainer," etc. Section 1249, referring to such causes, says: "In *actions* commenced before justices of the peace. * * *" We have no hesitancy in holding that these remedies are fairly covered by the word "actions," as used in section 1599, above considered.

We now pass to the principal question submitted for consideration. The objection under which this question arises challenged the jurisdiction of the justice of the peace over the *subject-matter*. It was therefore not waived by defendant's appeal to the county court. Section 1495 of the General Statutes, being section 9 of the forcible entry and detainer act, reads as follows: "The district courts in their respective districts, and county courts and justices of the peace in their respective counties, shall have jurisdiction of cases arising under this chapter. * * *" Counsel for plaintiff in error contend that this provision confers jurisdiction of cases under the

statute upon justices of the peace *throughout* their respective counties. There is no other provision in the act mentioned that deals with the territorial jurisdiction of justices of the peace. And, were there no statute elsewhere in any way relating to such jurisdiction, there could hardly be two opinions upon the subject. The phrase "in their respective counties," considered by itself alone, requires the interpretation given it by counsel. In fact, as we shall presently see, a similar phrase has been practically thus construed by this court.

But it is insisted that section 1932 of the General Statutes, which limits the jurisdiction of justices of the peace to the townships in which they reside, must be construed as applying to actions of forcible entry and unlawful detainer. In discussing this section, we shall assume that the word "precincts" must be substituted therein for the word "townships." See section 146, chapter 23, General Statutes.

So far as the two jurisdictional provisions under consideration are concerned, no argument in favor of an implied repeal or modification of section 1495 by section 1932 can be based upon the ground that the latter is a subsequent statute; for both sections were originally adopted, substantially as now existing, by the same legislature, and both were approved by the governor on the same day. Section 1932 is an amendment of the general act relating to justices of the peace and constables,—the act which treats of nearly all the various branches of jurisdiction conferred upon justices; but which, however, does not relate to or mention the actions of forcible entry and unlawful detainer. The section consists of a single affirmative declaration, with no negative words, and does not even declare that *all* suits shall be brought in the precincts specified. The forcible entry and detainer statute is, on the other hand, a separate and independent law, treating solely of the actions indicated by its title. Considering the language of the two provisions, and the circumstances

attending their adoption, we cannot say that there is such a repugnancy as requires us to hold that an implied repeal of section 1495 took place, or that there existed in the legislative mind any intent to change or modify that provision. The law does not favor repeals or modifications of this kind. "They will not be adjudged to follow, unless there is such a positive repugnancy that the two statutes cannot consistently stand together. The legislative intent to substitute the new for the old law must clearly appear." *Schwenke v. Union Depot & R. Co.* 7 Colo. 512.

The view that section 1932 was not *intended* by the legislature itself to repeal or modify section 1495 receives strong confirmation from the legislative procedure in the premises. The territorial legislature of 1861 adopted an act in relation to justices of the peace and constables. Section 1 of this act reads: "Justices of the peace shall have jurisdiction *in their respective counties* to hear and determine all complaints, suits and prosecutions of the following descriptions: * * *" Then follows a list of nearly all the causes over which justices of the peace are allowed to take cognizance. There was in the statute of 1861 no other provision relating to the territorial limits of the justices' jurisdiction. At the succeeding session, in 1862, the legislature adopted an act "amendatory" of the foregoing. Section 10 has come down to us as section 1932 above mentioned. It reads: "That suits shall be commenced before justices in the township in which the debtor or person sued resides, unless the cause of action accrued in the township in which the plaintiff resides, in which case the suit may be commenced where the cause of action accrued or is specifically made payable." Sess. Laws 1862, p. 77; Gen. St. p. 620.

Under the act of 1861, "debtors were sued in tribunals distant from their places of residence, and the cost and vexation of litigation were thereby unnecessarily and oppressively increased. As a security against this abuse,

this section (§ 10, Act 1862) was adopted, giving resident debtors a forum at their own doors." *Wagner v. Hallack*, 3 Colo. 176; *Denver, S. P. & P. R. Co. v. Roberts*, 6 Colo. 333. By enacting the precinct statute in 1862, the legislature unquestionably sought to curtail the territorial jurisdiction of justices of the peace conferred by the act of 1861. Thus it will be seen we have, in effect, both a legislative and a judicial declaration that the phrase, "in their respective counties," as used with reference to justices of the peace, conferred jurisdiction upon these courts *throughout* such counties. But at the session of 1862 the legislature also adopted a forcible entry and detainer act, in which the following language is used (sec. 5): "Justices of the peace, *in their proper counties*, and district courts in their respective districts, shall have concurrent jurisdiction in all cases arising under this act." Though changes have since been made in this statute, the above provision, so far as justices of the peace are concerned, has always remained substantially the same; and, as we have already declared, there has never been any qualification in the act itself of the territorial jurisdiction thus conferred.

The foregoing circumstances indicate strongly that the legislature did not intend to restrict to the justices' precincts the trying of actions in pursuance of the forcible entry and detainer statute; for it clearly appears that, while engaged in considering and passing the forcible entry law, that body not only interpreted the jurisdictional phrase used therein, but gave it an interpretation contrary to the supposed limitation. They specifically expressed this limitation as to all other actions before justices' courts; and the inference is irresistible, that, had they intended the limitation to apply to this class of actions, they would have so declared.

We feel impelled to the conclusion that it was the legislative intent to give justices of the peace an exceptional territorial jurisdiction in this particular class of cases, a

jurisdiction co-extensive with the areas of their respective counties.

The judgment of the county court is reversed.

Reversed.

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1. A justice of the peace has, under the statute, jurisdiction to try the issue raised by an answer in garnishee process setting forth that the garnishees held property by virtue of a chattel mortgage to them, to which a traverse is made alleging fraud and delaying creditors, and charging the garnishees with knowledge and participation in the fraud.
2. Under the statutes, the superior court of Denver has jurisdiction in appeals from decisions of justices of the peace in garnishment causes.
3. A stipulation in a case by both parties, made for convenience and expedition, but by which counsel inadvertently admit facts not in accord with the premises, and injurious to their client, may be relieved against; but to strike out a portion of a stipulation on the suggestion of one party is error if such part be material. The entire stipulation should be canceled.

Error to Superior Court, City of Denver.

PLAINTIFFS commenced this action against Henry Lloyd before George L. Sopris, justice of the peace, for a demand for rent due in the sum of \$172, and garnishee process issued, and defendants in error here, Noyes, Stark & Cross, were garnished by service of the garnishee summons. They answered the garnishee process as follows: “(1) Are you in any manner indebted to the defendant, Henry Lloyd, either property or money, and is the same now due? If not, when is the same to become due? State fully all particulars. *Answer.* We are not indebted to the defendant, but the defendant is indebted to us. We have in our possession property of the defendant which we hold, in connection with the Colorado Boot & Shoe Manufacturing Company, under a

chattel mortgage given to us and the Colorado Boot & Shoe Manufacturing Company by the defendant to secure indebtedness from said defendant to us and the said Colorado Boot & Shoe Manufacturing Company, which indebtedness has not been paid. (2) Have you in your possession, in your charge, or under your control, any property, effects, goods, chattels, rights, credits or choses in action of said defendant, or in which he is interested? If so, state what is the value of the same, and state fully all the particulars. A. We have some goods and merchandise of the defendants in our charge and under our control, as stated in answer to the last interrogatory, but of what value the same is we cannot tell. It inventories nearly \$500, and is held to secure an indebtedness of a little over \$300, and we believe at forced sale the said goods and merchandise would not sell for enough to pay said indebtedness. We have no other property, effects, goods, chattels, rights, credits or choses in action of said defendants in our possession or under our control. (3) Do you know of any debts owing to said defendant, whether due or not due, or any property, effects, goods, chattels, rights, credits or choses in action belonging to him, or in which he is interested, and now in the possession or under the control of others? If so, state the particulars. A. We do not."

To which the plaintiffs filed a traverse as follows:

"A. L. Welsh, of lawful age, being first duly sworn, says that he is one of the plaintiffs in the above-entitled action, which is pending before George L. Sopris, Esq., a justice of the peace in and for said county and state; that he has heard read the garnishees' answer herein and knows the contents thereof; that he was, at the time referred to in such answer, and at the commencement of this action, and is now, acquainted with the said garnishees and the defendant Henry Lloyd; that, at the time of giving the chattel mortgage, referred to in said

answer, a copy of 'which mortgage' is attached thereto, by the defendant to the mortgagees therein named (the Colorado Boot & Shoe Company and Noyes, Stark & Cross), the said defendant was justly indebted to the plaintiffs in the sum of \$172, balance due them from him [defendant] for rent of store building, where the goods and chattels mentioned in said mortgage were at the time it was given; that such demand for rent is the basis for their cause of action in this suit; that affiant believes that the said mortgagees knew of the existence of said demand at the time of the making of such mortgage, and alleges the fact so to be; that said mortgage is void, as to plaintiff's said demand, for the following, among other reasons: *First.* The description of the property purported to be covered by such instrument is vague, indefinite and uncertain, and the same is therefore void. *Second.* That it appears on the face of such mortgage that a secret trust was reserved to the defendant Henry Lloyd, mortgagee, with reference to the property therein mentioned; that he was permitted to retain the possession thereof till he should make default in the conditions of such instrument, and to use and enjoy such property, which will more fully appear by reference to said mortgage, which is made a part thereof as fully as if the same was copied herein at length; that from the very nature of such property no such trust could have been or could be reserved to said defendant in such instrument without rendering the same void as to plaintiffs and other creditors. *Third.* That at the date of such mortgage, and for some time thereafter, the said mortgagee, by himself or servants, continued to sell and dispose of large portions of said property with the knowledge and consent of the said mortgagees, as affiant believes; that as to the amount of such sale this affiant is unable to state. *Fourth.* Affiant alleges, upon information and belief, that said mortgage was not taken by the aforesaid mortgagees for the sole

purpose of securing their *bona fide* debts, respectively, against said defendant, but for the purpose and with the intent (which purposes and intent were shared in by the said defendant mortgagees) of keeping the property mentioned in the said instrument out of the reach of plaintiffs and other creditors of said defendant, and to hinder and delay them in the collection of their just debts by process of law, and to keep the same intact from any such process for the uses, benefit and enjoyment of said defendant. *Fifth.* That said chattel mortgage is absolutely void as to plaintiff's said claim. That this affidavit is made by way of traverse of said garnishees' answer, and further affiant saith not.

“[Signed]

A. L. WELSH.”

The chattel mortgage referred to was in the usual form; the description of the property being as follows: “All the stock of boots and shoes, of every kind and make, all the fixtures, and all and singular the personal property of every description belonging to and owned by the said party of the first part now situated in the premises known and numbered as 345, 16th street, in the city of Denver, in the county of Arapahoe and state of Colorado.” And the debt was described therein as follows: “The just and full sum of \$301.05, on or before the 1st day of April, 1883, with interest thereon according to the tenor and effect of two certain promissory notes given by the said party of the first part to the said parties of the second part, as follows: One of said notes, for \$180.30, dated February 13, 1883, due April 1st, after date, to the Colorado Boot & Shoe Company; and one for \$125.75, dated February 13, 1883, due April 1st, after date, to the order of Noyes, Stark & Cross; and each of said notes signed by the party of the first part under the name and style of Henry Lloyd,—then these presents to be void, otherwise to remain in full force and virtue.”

The plaintiffs recovered judgment for the \$172 against

the defendant Lloyd, and the issue between the plaintiffs and the garnishees, Noyes, Stark & Cross, was submitted to the justice on the following stipulation:

"A. L. Welsh & Co. v. Henry Lloyd.

"Before Justice Sopris.

"The right of the plaintiff to recover of Noyes, Stark & Cross, garnishees herein, is submitted to the court on the following agreed state of facts, which are to be considered in connection with the law in the case: (1) The chattel mortgage hereto attached, and marked 'A,' is admitted to be a correct copy of the chattel mortgage which was executed by defendant in favor of garnishees *et al.*, and duly recorded; (2) that Noyes & Co., the next day after such record, attached a part of the stock covered by such chattel mortgage; (3) that, the next day thereafter, mortgagees [garnishees] took possession of the stock in the store of defendant under their claim of right by virtue of such chattel mortgage; (4) that A. L. Welsh & Co. sued defendant Lloyd by attachment, as will appear from the summons hereto attached, and marked 'B,' and from the files of the case, and garnished Noyes, Stark & Cross; (5) that garnishees answered, as is shown by their answer hereto attached, and marked 'C;,' (6) that A. L. Welsh & Co. traversed garnishees' answer, as will be seen by reference to paper 'D,' herewith filed. No legal proposition stated in garnishees' answer, or plaintiffs' traverse thereof, is admitted. All matters of fact therein stated are admitted to be substantially true. That garnishees have said, since garnishment, that they have the stock of goods taken under said chattel mortgage now in their cellar intact, and that should the defendant Lloyd return to the city, and pay off their claim, and that of the Colorado Boot & Shoe Company, they [garnishees] will return him [said Lloyd] the said stock of goods. Plaintiffs do not admit the said chattel mortgage is sufficient in law to relieve the garnishees from liability to plaintiffs [garnishors], while the garnishees

claim their answer fully and completely establishes their legal right to hold said stock of goods under said chattel mortgage, and release them from any liability to garnishors, plaintiffs under the garnishment proceedings therein. Under the facts and the law this case is now submitted.

“ Denver, Colorado, March 19, 1883.

[Signed]

“ A. L. WELSH & Co.,

“ By their Attorneys.

“ NOYES, STARK & CROSS,

“ By their Attorneys.”

Whereupon the justice gave judgment for the garnishees, and ordered their discharge, from which judgment the plaintiffs appealed to the superior court of Denver, and the same was submitted to that court upon the following stipulation:

*“ IN THE SUPERIOR COURT OF THE CITY OF DENVER,
COUNTY OF ARAPAHOE, STATE OF COLORADO.*

*“ A. L. Welsh & Co., Plaintiffs, vs. Noyes, Stark & Cross, as Garnishees of Henry Lloyd, Defendants.—
In the Matter of the Garnishment of said Noyes, Stark & Cross.*

“ STIPULATION.

“ This cause having been appealed from the decision and judgment rendered by G. L. Sopris, Esq., a J. P. in and for said county, in said matter of garnishment, to this court, now, therefore, it is mutually stipulated by and between said A. L. Welsh & Co., plaintiffs, and said garnishees, Noyes, Stark & Cross, and their attorneys, respectively, (1) that said matter, as to garnishees' liability herein, shall be submitted and determined in this court upon the same agreed statement of facts entered into between said parties in writing filed with such justice, and returned by him to the clerk of this court, as the evidence herein; (2) that the clerk of this court is authorized to file this stipulation, and attach the same to such

agreed statement of facts; (3) this stipulation, and such agreed statement of facts, after a decision in said matter, on application of either party, shall form and constitute the grounds for a bill of exceptions herein, and shall be signed, sealed, and allowed by said court, or the judge thereof, as such bill of exceptions.

“Dated Denver, May 4, 1883.”

Signed by plaintiffs' and garnishees' attorneys, June 21, 1883.

The plaintiffs and garnishees filed in said court a certain other stipulation in writing in said cause, which is in the following words and figures, to wit:

“[Title of Cause.]

“It is hereby mutually agreed and stipulated by and between the said plaintiffs and the said garnishees—First, that the only point in controversy between the said plaintiffs and garnishees is as to the validity of such chattel mortgage as against creditors of said defendant Henry Lloyd under the agreed state of facts herein,—plaintiffs taking negative, and garnishees the affirmative; second, that this stipulation shall be attached to the last stipulation filed in this cause, which shall then and there become a part thereof, and of the record herein.

“Dated June 21, 1883.”

Signed by plaintiffs' and garnishees' attorneys.

Afterwards, on the 24th day of November, 1883, the following motion and affidavit were filed:

“Now come the garnishees above named, and move the court either to order that the stipulation now filed in this court in this cause be withdrawn, and taken from the files of the court, or that the said stipulations be amended by striking out of the stipulations filed in this cause in the court of George L. Sopris, a justice of the peace within and for the county of Arapahoe, on the 15th day of March, A. D. 1883, the clause which reads as follows: ‘All matters of facts therein stated are admitted to be substantially true.’ And for grounds of motion

say: (1) That, when the said stipulation was made and entered into between the parties thereto, the several reasons set forth in the affidavit of A. L. Welsh, purporting to traverse the above-named garnishees' answer filed therein, why the garnishees' mortgage is void, which reasons are embraced in five paragraphs of said affidavit, numbered from one to five, inclusive, were not understood and intended by the parties thereto to be matters of fact which were admitted to be true, but were, by the parties to said stipulation, expressly understood and intended to be legal propositions which were not admitted. (2) That the said clause was inserted in said stipulation by mistake as to the scope and meaning thereof; counsel for the garnishees then believing and understanding that it did not, and was not to be taken to, admit as true any of the reasons contained in the affidavit of A. L. Welsh, purporting to traverse the answer of the above-named garnishees why the mortgage of the garnishees was void, said reasons being embraced in five paragraphs of the said affidavit, but believing and understanding that said reasons were legal propositions which the said clause did not cover. (3) That to allow said clause to remain in said stipulation would prevent a trial of the matters in issue in this cause, and cause a miscarriage of justice. And upon said motion, and in support thereof, the said garnishees will read the affidavits of George L. Sopris and P. L. Palmer, Esq., which affidavits are filed herewith.

J. W. HORNER, Att'y for Garnishees.

“GEORGE L. SOPRIS' AFFIDAVIT.

“Geo. L. Sopris, of lawful age, being first duly sworn, deposes and says that he is a justice of the peace within and for the county of Arapahoe, in the state of Colorado; that he was such when the above-entitled cause was commenced before him, and continued to be such until this cause was removed from his court to the superior court of the city of Denver; that, as such justice, he had

jurisdiction over the matters in this cause; that on the 15th day of March, A. D. 1883, A. J. Sampson, Esq., acting as counsel for the plaintiffs, and J. W. Horner, who was represented by P. L. Palmer, acting as counsel for the above-named garnishees, filed in his court a stipulation as to the facts mutually admitted by both of said counsel, and this cause was submitted to him upon said statement of facts, and said counsel afterwards filed in his court their briefs upon the matters of law involved in this cause; that, when the said stipulation was filed in his court, he clearly understood that the reasons stated and set forth in the affidavit of A. L. Welsh, which are embraced in five paragraphs, why the chattel mortgage of the said garnishees was void, were considered and intended by the counsel for said parties to be propositions of law, and not matters of fact admitted by said counsel as true; that said understanding was gained from the conversation he heard between said counsel when said stipulation was agreed upon; that the counsel for the plaintiffs never contended in affiant's court that the said reasons were matters of fact admitted to be true, but, on the contrary, his position was that they were legal propositions; that the said counsel for the plaintiffs submitted his brief in this cause, and therein discussed these very reasons as legal propositions, not therein contending that they were matters of fact admitted by the garnishees, and in no way relying upon them; that he acted upon the meaning, intention and interpretation of the said counsel of said stipulation; and, after advising himself upon the facts, and considering the arguments adduced *pro* and *con* by said counsel, he gave judgment against the plaintiffs, and in favor of the garnishees.

[Signed]

“GEO. L. SOPRIS.

“Subscribed and sworn to before me this 22d day of November, A. D. 1883.

“CHARLES D. MAY, Notary Public. [SEAL.]

“P. L. PALMER’S AFFIDAVIT.

“P. L. Palmer, of lawful age, being first duly sworn, deposes and says that he was, at the dates when the stipulations herein were entered into and filed, an attorney and counselor at law duly authorized to practice in the courts of record in the state of Colorado; that he was at that time in the employment of J. W. Horner, who appears as attorney of record in this cause; that the conduct of this case was intrusted to him by said J. W. Horner, and that he had the sole charge and conduct of this case when the same was tried in the justice’s court of George L. Sopris, Esq., a justice of the peace in and for the county of Arapahoe; that, when this cause came up for hearing in said justice’s court, it was mutually agreed by and between A. J. Sampson, who was then and still is counsel for the plaintiffs, and this deponent, that the case should be heard and tried upon facts to be agreed upon and submitted to the said justice, and that thereupon the stipulations filed in said justice’s court were drawn up and filed,—said stipulation being the same as is now filed in this court; that, before and at the time said stipulations were drawn up and signed, this deponent expressly called the attention of said counsel for the plaintiffs to the reasons set forth in the affidavit of A. L. Welsh,—said affidavit purporting to traverse the answer of the said garnishees filed in this cause, and said reasons being contained in five paragraphs of said affidavit, and numbered from one to five, inclusive, why the chattel mortgage of the garnishees was void,—and then and there it was expressly understood between this deponent and said counsel that said five reasons were propositions of law which were not admitted, and not matters of fact admitted to be true; that, upon that express understanding, the said counsel, or his partner, Nelson Millett, and this deponent argued this cause before the said justice, and said counsel never pretended then, nor did he then

take the position, that said reasons mentioned in said affidavit were matters of fact, but discussed said reasons then as matters of law, arguing the case upon its merits, and in no way relying upon the matters stated in said affidavit as admitted; that this deponent believed, when said stipulation was entered into, that said reasons were legal propositions, and would not have entered into or signed said stipulation upon any other understanding or intention than that said reasons were legal propositions, which were not admitted, and not matters of fact admitted to be true. [Signed] P. L. PALMER.

“Subscribed and sworn before me this 22d day of November, A. D. 1883.

“CHARLES D. MAY, Notary Public.” [SEAL.]

On the same day the court granted the motion in the matter, to the extent of striking out the fourth paragraph of the plaintiffs' traverse, to which exceptions were duly reserved by plaintiffs. On the 4th day of February, 1884, the court adjudged that it was without jurisdiction in the case, and accordingly ordered the discharge of the garnishees. Exceptions reserved, and the case brought here on error. The errors assigned and argued by counsel are that the superior court erred in adjudging that it had no jurisdiction in the case, and the modification of the stipulations of counsel by striking out part of the traverse of plaintiffs to answer of garnishees, and for discharging the garnishees.

Messrs. SAMPSON and MILLETT, for plaintiffs in error.

Mr. JOHN W. HORNER, for defendant in error.

STALLCUP, C. The first question presented is, Had the superior court jurisdiction in the case? In the argument of this question here, counsel have ignored the statutes for this proceeding before a justice of the peace, and have discussed the question on the assumption that the issue involved a matter of equity jurisdiction, and for that

reason the justice was without jurisdiction, and consequently the superior court without jurisdiction. The issue made and tried before the justice was upon the traverse of plaintiffs to the answer of the garnishees. The garnishees in their answer disclosed the chattel mortgage of defendant to them, and that they held a stock of goods by virtue of such chattel mortgage. In the traverse, among other things, it was alleged that the chattel mortgage was given by the defendant to the garnishees with intent and for the purpose of hindering and delaying creditors, and also charging the garnishees with the knowledge of and participation in such fraud. The justice had jurisdiction to hear and determine such issue.

Section 1553, page 517, General Statutes, provides for the garnishee summons issued in the case. Section 1554 provides for the interrogatories and answers in the case. Section 1557 provides for the traverse of such answer by the plaintiffs, and for the issuing of the *scire facias* requiring the garnishees to appear before the justice on the date named therein to try the issue so made, as was done in this case. Section 1563 provides that judgment by the justice against such garnishee shall acquit the garnishee from all demands of the defendant; for all goods, effects and credits paid, delivered or accounted for by the garnishee by force of such judgment. Section 1526 provides that every conveyance or assignment in writing or otherwise of any estate or interest in lands or goods, and every charge on lands or goods, with intent to hinder, delay or defraud creditors of their lawful demands, shall be void as against such creditors. Section 1529 provides that the question of fraudulent intent in such cases shall be deemed a question of fact, and not of law. Section 1530 provides that the purchasers in such cases are implicated in such fraud by previous notice. From these provisions it is apparent that the justice had jurisdiction to hear and determine the issue so made between

the plaintiffs and the garnishees. Had the superior court like jurisdiction on appeal from this judgment?

Section 1573 especially provides for appeals from such judgments of the justice, and section 3222 of the same General Statutes vests the superior court with such appellate jurisdiction. The superior court erred in adjudging that it had no jurisdiction in the case.

The next question is, Did the superior court err in ordering the modification of the stipulations of counsel in the case by striking out the fourth paragraph of plaintiffs' traverse to the answer of the garnishees? Agreements of this kind are unlike ordinary contracts between parties not in court. In a stipulation by counsel for convenience or expedition in the trial of a case, if counsel, inadvertently or otherwise, admit or state a fact not in accord with the premises, entirely against the manifest purpose and intention of the parties and the nature of the controversy, and to the irreparable injury of the client they represent, as this seems to be, the court wherein such cause is pending has the power, and rightfully exercises it, to relieve the party from such stipulation. *Richardson v. Musser*, 54 Cal. 196; *Becker v. Lamont*, 13 How. Pr. 23. But such relief cannot be granted in the way it was done in this instance. The paragraph struck out was a material portion of the traverse; and, if true, vitiated the chattel mortgage, and made the goods subject to the payment of the debt of plaintiffs. So that the rights of the plaintiffs were thereby materially affected. The court erred in making such order. The proper way to relieve the party from such stipulation is to cancel the stipulation. It follows that the discharge of the garnishees in the premises was error.

The judgment should be reversed and the case remanded.

MACON and RISING, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment is reversed and the case remanded.

Reversed.

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10	146
16	40

SCHOFIELD V. FELT.

1. To warrant the execution of an appeal bond by an attorney in fact, authority therefor, of equal extent with the bond, is necessary, and should accompany the bond; and, when the authority of the agent is challenged by motion to dismiss the appeal, it should be produced; but, under General Statutes, section 1986, the appeal should not be dismissed because the appellant does not, upon the bond being declared insufficient, ask leave to file one that is sufficient. Under such circumstances, the court should enter a rule, to be made absolute on the appellant's failing to file such bond within a reasonable time.
2. Where the appeal bond has been filed and approved, and an appeal accordingly prayed, within the ten days fixed by General Statutes, section 1979, the failure to pay to the justice the costs of the appeal within that time is no ground for dismissing the appeal.

Error to County Court, Arapahoe County.

ON motion to dismiss an appeal from justice's court.

On the 15th of November, 1883, judgment for \$80 was rendered in a case pending before George L. Sopris, justice of the peace in Arapahoe county, against said Schofield, the defendant therein, and in favor of said Felt, the plaintiff therein. On the 23d day of November, 1883, the said Schofield filed with said justice his bond for appeal of said case to the county court, and accordingly prayed appeal thereon. The said bond was then duly approved by the justice. On the 3d day of December, 1883, the said Schofield paid the said justice \$2, the cost of granting the appeal, and the said justice then certified the case to the county court, and a transcript of the justice's record was thereafter filed in the county court. On the 22d day of December, 1883, the said Felt filed in the

county court his motion to dismiss the appeal, for the following reasons: “(1) Because said Schofield did not pay, or cause to be paid, the cost of granting the said appeal from the said justice within ten days from the rendering of the judgment; (2) because said Schofield has not filed any appeal bond at all in said case in the county court; (3) because said Schofield did not perfect his appeal in said case within ten days from the rendering of judgment; (4) because said Schofield did not procure, or cause to be procured, the granting of said appeal within ten days from the rendering of the judgment. On the 24th day of January, 1884, the said motion was submitted upon the record in the case, and was sustained by the court, and the appeal thereupon dismissed. Exceptions were duly reserved, and the case comes here on error, and the one error assigned is that the court erred in sustaining said motion and dismissing said appeal.

Mr. P. L. HUBBARD, for plaintiff in error.

Mr. C. H. BURTON, for defendant in error.

STALLCUP, C. Two questions are presented for consideration. The first is as to the sufficiency of the bond for appeal to the county court. The record shows that the appeal bond was executed as follows: “Lott Schofield, by P. L. Hubbard, his duly-appointed Agent for the Purpose of executing this Bond. A. L. Schofield, Surety.” It is urged by counsel for defendant in error that the bond was insufficient, in that it was not executed by the principal in person. To warrant such execution of the bond, authority therefor of equal rank with the bond was necessary, and should have accompanied the bond; and when the authority of the agent to execute the bond was challenged, as it was by the motion to dismiss the appeal, the authority for so executing the bond should then have been produced if any such authority existed. On the failure to make such showing, the court was warranted in adjudging the appeal bond insufficient; but the court was not warranted in the dismissal

of the appeal therefor, notwithstanding the appellant failed to ask leave to file a sufficient bond, as by such absolute dismissal the appellant was denied the right provided for such cases by section 1986 of our General Statutes, which is as follows: "If, upon the trial of any appeal, the bond required to be given shall be adjudged informal or otherwise insufficient, the party who shall have executed such bond shall in nowise be prejudiced by reason of such informality or insufficiency: provided, he will within reasonable time, to be fixed by the court, execute a good and sufficient bond." This is a copy of the statute of Illinois upon the same subject. The appellant was entitled to reasonable time in which to file a sufficient bond, and it was the imperative duty of the court to enter a rule that, unless the appellant filed a sufficient bond by the day named in the rule, the appeal would be dismissed. *Wear v. Killeen*, 38 Ill. 259.

The second question presented is as to the cost of the appeal. Must a payment thereof be made to the justice within ten days after rendering the judgment to warraht the appeal, notwithstanding the appeal bond had been filed and approved, and an appeal accordingly prayed, within the ten days? Sections 1979, 1980 and 1981 of our General Statutes provide for such appeals. The payment of the costs of the appeal to the justice, thereby required, is not a jurisdictional provision. The justice may refuse to act until such costs are paid. It is merely a provision in his behalf to enable him to require the payment of such costs. *Carbonate Town Co. v. Ives*, ante, p. 81.

The judgment should be reversed and the case remanded, with directions to the county court to proceed in accordance with this opinion.

MACON and RISING, CC., concur.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded.

Reversed.

COUNTY OF SAGUACHE V. DECKER ET AL.

10	149
29	66

1. Under the statutes the whole of a county may be required to pay the charges incurred in staying the spread of contagious disease therein, instead of that portion thereof constituting the certain community wherein the disease was first discovered.
2. Repeals by implication are not favored.

Appeal from District Court, Saguache County.

APPELLEES, on the 9th day of July, A. D. 1883, presented to the county commissioners of Saguache county, and asked to have allowed, the following bills for services rendered and necessities furnished in small-pox cases in the town of Bonanza, in said county: Mrs. Alice N. Hunt, bath-tub, \$15; Mrs. Anna Gray, nurse, \$40; Decker Bros., drugs, etc., \$35; Decker Bros., drugs, etc., \$24; W. L. Taylor, guard, \$17.50; W. L. Taylor, guard, \$63; John M. Brown, messenger, \$63; Edward Nathan, guard, \$129; Edward Nathan, guard, \$46.50,—which bills were disallowed by the commissioners; from which appeal was duly taken to the district court for said county, and was there duly heard on the 15th day of September, 1883, upon the following stipulation:

“The said parties hereby agree upon the following statement of facts, and submit the same to the court for the determination of the points in controversy hereinafter specified. The points agreed upon are as follows: That there is now, and has been since the year 1881, within the county of Saguache, state of Colorado, an incorporated town designated and known as the town of Bonanza City; that said town has now, and has had since 1881, a duly elected and qualified board of trustees; that the board of trustees of said town for the years 1882 and 1883 appointed a board of health of, in and for said town, which said board of health qualified and acted as such board of health in pursuance of such appointment; that said board of health, so acting, were notified that

certain persons residing within said town of Bonanza City aforesaid were infected with a disease dangerous to the public health, to wit, small-pox; that on receiving such notice, said board of health proceeded to act as provided in sections 2093 and 2094 of the General Laws of the state of Colorado, which action was as follows: They purchased through one of their members, J. R. Ramsey, physician of the board, medicine, drugs, etc., from Decker Bros., as shown by bill presented to board of county commissioners, and certified as part of record and proceeding had before said board, and that they deemed the same necessary for the safety of the sick and the inhabitants of the town; that the physician deemed a bath-tub necessary for the safety of the sick, which the said board purchased from Mrs. Alice Hunt, as per bill rendered commissioners; that they employed Anna Gray as a nurse, which they provided to take care of the sick; that the infected persons could not be removed without endangering their health; that they, the said board of health, provided for said infected persons in the houses in which they were; that said board of health thought it necessary for the safety of the inhabitants that two guards, one at night and one by day, be employed to guard said premises and prevent the spread of said disease, for which purpose they employed W. L. Taylor and Edward Nathan, as per bills presented to county commissioners and made part of this record; that said board of health deemed it necessary for the safety of the inhabitants that a messenger be employed to bring to and take from the infected premises such things as were needed by the nurses or sick, for which purpose they employed J. M. Brown, as per bill rendered county commissioners and made part of the record hereto; that, after the disease had been suppressed, the several parties presented their bills to the county commissioners for payment; that the board of county commissioners had no notice of the contracting of such bills till presented; that the board of

county commissioners disallowed said bills on the ground that the county was not liable therefor.

“The points in controversy, and upon which the decision of the court is asked, are as follows: The foregoing bills having been contracted by a duly appointed and organized board of health within the county of Saguache, when said board of health is the board of health of an incorporated town, is or is not the county liable therefor?”

Upon the foregoing statement of facts, the district court found as follows: “That there is due from the defendant to the respective plaintiffs individually, by occasion of the premises specified in said statement of facts, as follows: To J. W. Decker, the sum of \$59.50; to Mrs. Alice A. Hunt, the sum of \$15; to Mrs. Anna Gray, the sum of \$40; to W. L. Taylor, the sum of \$80.50; to Edward Nathan, the sum of \$176; and to John M. Brown, the sum of \$63.” Whereupon the court entered judgment against the county of Saguache for said several sums in favor of the said plaintiffs, respectively, and for costs; from which judgment the defendant appealed to this court.

Mr. GEORGE TUCKER, for appellant.

Mr. J. M. DENNY, for appellees.

STALLCUP, C. Is the county liable for these charges? is the question here presented and argued. It is urged upon the part of the appellees that the county is liable for these charges, under the provisions of sections 2643 and 2644 of the General Statutes of 1877, which are sections 2093 and 2094 of the General Laws, and are as follows:

“Sec. 2643. When any person coming from abroad, or residing within any town, city, or county within this state, shall be infected, or shall lately before have been infected, with the small-pox, or other sickness dangerous

to the public health, the board of health of the town, city, or county where such person may be, shall make effectual provisions, in the manner in which they shall judge best, for the safety of the inhabitants, by removing such sick or infected person to a separate house, if it can be done without danger to his health, and by providing nurses and other assistance necessary, which shall be at the charge of the county to which he belongs.

“Sec. 2644. If any such infected person cannot be removed without danger to his health, the board of health shall make provision for him, as directed in the preceding section, in the house in which he may be, and in such case they may cause the persons in the neighborhood to be removed, and may take such other measures, in respect to the same, as they may deem necessary for the safety of the inhabitants.”

The title of this act is, “An act to preserve the public health.” It was approved February 24, 1877, and the first section thereof provided that the county commissioners should constitute the board of health of the county.

Upon the part of the appellant, it is conceded that, if these provisions were not repealed, the county is thereby liable; but it is urged by appellant that by force of the provisions of section 3312 of the General Statutes, being a subsequent enactment, the above-quoted provisions of the former act in this regard are necessarily repealed.

The said provisions of said section 3312 are as follows: “The city council and board of trustees in towns shall have the following powers: * * * *Third.* To levy and collect taxes for general and special purposes on real and personal property. * * * *Forty-sixth.* To appoint a board of health and prescribe its powers and duties. *Forty-seventh.* To enact and establish hospitals and medical dispensaries, and to control and regulate the same. *Forty-eighth.* To do all acts and make all regulations which may be necessary or expedient for the promo-

tion of health or the suppression of disease." The title of this act is, "An act in relation to municipal corporations," and was approved April 4, 1877.

There is no repeal of the former provisions by the latter. The two do adjust and stand together. By these provisions of the legislature, the whole of the county may be required to pay the charges incurred in staying the spread of contagious disease therein, instead of that portion thereof constituting the certain community wherein the disease is first discovered. Repeals by implication are not favored. *Scofield v. White*, 7 Cal. 400; *People v. San Francisco & S. J. R. Co.* 28 Cal. 254; *Walker v. State*, 7 Tex. App. 245; *Chesapeake & O. R. Co. v. Hoard*, 16 W. Va. 270; *Parker v. Hubbard*, 64 Ala. 203.

The judgment should be affirmed.

RISING and MACON, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment is affirmed.

Affirmed.

GIBBS ET AL. V. WALL ET AL.

1. If the appellant writes, at the close of each instruction to which he excepts, the words "excepted to," there is a substantial compliance with code of Colorado, page 56, section 69, providing that "a party excepting to the giving of the instructions * * * shall not be required to file a formal bill of exceptions, but it shall be sufficient to write at the close of each instruction to which exception is taken the words 'excepted to,' which shall be signed by the judge." The omission of the judge to sign an instruction so excepted to cannot prejudice the rights of the appellant.
2. Nor is the omission of the appellee to number the instructions prayed by him, and excepted to by the appellant, a fatal defect.
3. An assignment of error upon an instruction which sets out the instruction excepted to *in hæc verba* is sufficient.
4. Where the only issue made by the pleadings is as to the fact of a warranty as to the disposition of certain horses sold by the defend-

10	153
17	196
10	153
8a	285
10	153
12a	540

10	153
27	73
10	153
19a	411

ant to the plaintiff, and there is no plea or proof of accord and satisfaction or payment, there is no foundation for an instruction as to the verdict which the jury should render, if they should find that there had been a settlement between the parties, and it is error to give such an instruction.

5. Where an express warranty is alleged and proved, and there is no contention at the trial as to an implied warranty, an instruction as to the effect of an implied warranty, if proven, is inapplicable to the issue, and is calculated to mislead the jury.
6. An objection that the evidence did not support the verdict will not be inquired into on appeal, where the bill of exceptions shows affirmatively that the evidence elicited in the case is not contained therein.

Appeal from District Court, Saguache County.

THE facts are stated in the opinion.

Messrs. ARTHUR and VOSBURG, for appellants.

MACON, C. By the uncontradicted testimony in this case, it appears that on the 17th day of May, A. D. 1881, appellees sold appellants five horses for use in a livery-stable, carried on by appellants at that time in the town of Saguache, in this state, and warranted them all to work well, either single or double, except one, as to which they declined to warrant him to work alone, but did warrant that he would work double. On trial of the horses, they were all found to be balky, and, while they would work well at times, they were liable to stop and refuse to go at any time. Two of these horses were driven by appellees for appellants before the purchase, and showed no bad traits, and seemed to be satisfactory to appellants; but the other three were not tried before the purchase, and were bought on the warranty aforesaid. One Buchanan acted as salesman in the transaction for appellees, and was called and examined as their witness on the trial, and admitted that one of the horses had to be led before he was driven out of Denver by appellants on their way to Saguache. The horses were sold and bought in the city of Denver.

It was also shown by uncontradicted testimony that of the two horses known as the "chestnut team" one or both balked on the way to Littleton on the same day that appellants left Denver to go to Saguache. On the arrival of appellant Fish at Monument, he stopped and corralled the horses, and returned to Denver, called upon Buchanan, complained of the horses, and informed him of their balky disposition, and of the trouble he had had in driving them. Buchanan returned with Fish to Monument to examine the horses, and assist him to drive them from Monument to Colorado Springs, a distance of about twenty-five miles. Some of these horses balked with Buchanan at Colorado Springs, and Fish expressed to Buchanan a desire to return the horses to appellees, but was dissuaded therefrom by Buchanan's assurance that the horses would drive well by the time they reached Saguache, and if they continued balky after their arrival at Saguache, that appellees would make it "all right," and at the same time gave Fish \$20 or \$30, as Buchanan says, to pay the expenses of delays occasioned Fish by the bad disposition of the horses, and also paid the stable bill at Colorado Springs. This sum of \$20 or \$30 and the stable bill were not given or received as a satisfaction for the breach of the warranty. Buchanan returned to Denver and Fish to Saguache with the horses, and put them in the livery-stable of appellants. Their dispositions did not improve, and they continued from time to time to balk, though they were used in and about the livery-stable, and let to customers. Some time after Fish's arrival at Saguache he returned to Denver, called on Buchanan, and stated to him that the horses continued unsatisfactory, and were not as they had been warranted to be; and called also upon appellee Wall, had some conversation with him on the subject, and was told by Wall to wait until appellee Witter returned to Denver, and they would endeavor to arrange the matter; whereupon Fish returned to Saguache, and no further negotiations took place between them on the subject.

Some time in the month of July, 1881, appellants brought suit against appellees upon the warranty, in the county court of Saguache county, setting up the terms of the warranty to be that said horses were kind, thoroughly and well broke, and would drive single and double, and that they were in all respects suitable and proper horses for plaintiffs' use in their livery-stable; averring breach of the warranty, and laying their damages at \$500. Defendants below answered, admitting that plaintiffs were partners, and that defendants were also partners; admitting also the sale of the horses; but deny that any of the horses were warranted as to any quality, or that they made any representations as to the horses; and aver that plaintiffs acted upon their own judgment in selecting the horses, after having carefully tried the same; further aver that plaintiffs took possession of the horses, and converted them to their use, and had never returned, or offered to return, the same, and still had possession thereof; averring the value of the horses to be \$750.

In the month of September of that year the case came on for trial in said court, and judgment was rendered against the plaintiffs below for costs, from which judgment the plaintiffs appealed to the district court of said Saguache county; and on the 24th day of December, 1881, the cause was tried in the district court, and a verdict found for defendants. Plaintiffs filed a motion for a new trial, which was overruled by the court, and judgment rendered on the verdict, to which plaintiffs excepted, and appeal to this court, and assign ten errors occurring in the trial.

Before examining the assignments of error upon the instructions refused for plaintiffs, and given for defendants, it is necessary to consider the objection of defendants, made in argument, that no proper exceptions were taken and saved to the instructions now objected to, because the same were objected to *en masse*. If this point is well taken, it would seem to bring this case within the

rule pointed out and enforced in *Webber v. Emmerson*, 3 Colo. 251. It is true that in the bill of exceptions, following immediately after the instructions, this sentence occurs: "Whereupon the plaintiffs, by their counsel, excepted to the court giving the above and foregoing instructions on behalf of defendants." If this were all the bill of exceptions contained as to exceptions taken by the plaintiffs in error to the instructions in behalf of defendants, it might be necessary to hold that such exception was not sufficient; but it clearly appears in the bill of exceptions that each of the first four instructions given in behalf of defendants was specifically excepted to by plaintiffs. In the margin of each of these four instructions are found the words, "Excepted to by plaintiffs." Does this show an exception to each of these instructions? We think it does. It is true that section 69, page 56, Code, in force at the time of this trial, provides that "a party excepting to the giving of the instructions, or the refusal thereof, shall not be required to file a formal bill of exceptions, but it shall be sufficient to write at the close of each instruction to which exception is taken the words 'Excepted to,' which shall be signed by the judge." This provision was intended to guide and direct the judge, not that of the party litigant, except so far as such party was required to write upon the instructions his exception. The signature of such judge the party might well leave to the judge, upon the assumption that he would do that which by law he was required to do, and we cannot hold that the omission of the judge to comply with this direction of the statute ought to or can prejudice the rights of the party. If the party wrote at the close of each instruction to which he excepted the words "Excepted to," he did all he was required to or can do, and may well trust the judge to do his duty in the premises. The judge has in this instance signed the bill of exceptions, which shows unequivocally that, at the close of each of the aforesaid four instructions for

defendants, the plaintiffs in error excepted thereto; and the insertion in the same bill of exceptions of the general words above quoted does not change the effect of the specific statements found therein. The maxim, *utile per inutile non vitiatur*, has a perfect application in this particular. The specific exception to each of the first four instructions given for defendants is well shown in the record, and the omission of the judge to sign such exceptions cannot preclude an examination of the errors assigned thereon by this court.

As to instructions 2 and 3, prayed by the plaintiffs and refused by the court, and as to the giving of the same as modified by the court, there seems to have been no specific exception, and for that reason the assignments of error thereon will not be considered.

It is further contended by defendants in error that the assignments of error did not sufficiently point out the action of the court, or the language of the instructions excepted to. The fifth and sixth assignments upon the first and second instructions given for defendants in error set out *in hæc verba* the instructions excepted to, and it is impossible to conceive how they could be more specific. The rule does not require that the assignments of error should be an argument, and to require more particularity than has been required in this case would be to require an argument establishing the error complained of.

It only remains to inquire whether, in giving such instructions as plaintiffs in error properly excepted to at the trial below, and upon which they have assigned error in this court, there is any material error prejudicial to plaintiffs. The fifth assignment goes to the first instruction asked by and given for the defendant below. In the instruction there is error for two plain reasons: (1) There was no plea of accord and satisfaction or payment of any damages arising upon the breach of warranty; and (2) because there was no evidence which justified such instruction. The following is the instruction: "The court

instructs the jury that if you believe from the evidence that, before the plaintiffs arrived in Sagauche with said horses, on the way home, they discovered said defects in their traits and qualities, that they notified defendants about it, and defendants, or any one of them, came to plaintiffs and settled for such defects so supposed to exist, by paying plaintiffs \$100, or any other sum, then the jury are instructed that was an accord and satisfaction of any claim plaintiffs had on account of any defects in said horses, and you will find for defendants."

It has already been said that the only issue made by the pleadings was as to the fact of a warranty of the disposition of the horses, and in the trial the giving of the warranty was confessed by Buchanan. There must be some correspondence and relation between the claim or defense and the evidence; and though a party may, through ignorance or inadvertence, sit by and allow his adversary to prove a case that he has not pleaded, no judgment should be given upon a case so made without at least an amendment of the pleadings. *Thomas v. Mackey*, 3 Colo. 390; *Burdsall v. Waggoner*, 4 Colo. 256, 261. Had there been a plea of payment or accord and satisfaction, or of partial payment, and any evidence to support such defense, the instruction would have been proper; but in this instance there was no foundation for it, either in the pleadings or evidence. No witness testified to any settlement of the damages or payment thereof. Buchanan, who paid the \$20 or \$30 and stable bill, did not pretend to have understood that this money was paid or accepted for any such purpose, but for the expenses caused by the delay occasioned by the horses balking on the way to Colorado Springs. He says, after speaking of his going from Monument to Colorado Springs with appellant Fish: "Then I told Mr. Fish that as they had been delayed on the road, that I wanted to pay them something for their trouble, and paid them some \$20 or \$30 for their trouble, and paid their stable bill. * * *

He took the money from me, and did not say whether it settled the matter or not, and told me that he was satisfied that there would be trouble." He was then asked by appellants' counsel, "Did not you tell Fish to take the horses along, and, if they were not all right, that we would make it 'all right?'" to which he answered, "I did." It is too clear for dispute that neither Buchanan nor Fish intended this payment to be settlement or satisfaction to appellants for breach of the warranty. Such payment might be applied in reduction of the damages arising upon the breach of the warranty had there been any plea to justify such application of the payment; but in this case there was not. The court overlooked the pleadings, and mistook the effect of the evidence, and in that way fell into the error pointed out.

The sixth assignment is directed against the second instruction for the defendants below, which is in the following language: "The court directs the jury that if you believe from the evidence that the plaintiffs, or either of them, were present when the horses were sold, and examined them, and hitched them up and drove them, then you are instructed that there is no implied warranty, as to their traits or qualities, which have been discovered, and the plaintiffs must show, by preponderance of evidence, that there was an express warranty of said horses by defendants; and, if they fail to do so, you will find for the defendants." Plaintiffs below did not proceed upon an implied warranty, and in the trial there was no contention upon it, but in their complaint alleged and on the trial proved an express warranty. The instruction therefore was inapplicable to any issue in the case, and was calculated to lead the minds of the jurors from the true issue.

The seventh and eighth assignments of error are based upon the failure on the part of defendants to number the instructions prayed by them, and of the judge to sign the exceptions of appellants' counsel thereto. These omis-

sions are not fatal, and the judgment is not vitiated by any such omission.

The tenth and last assignment of error is that the court erred in overruling plaintiffs' motion for a new trial, because the evidence did not support the verdict, and because defendants admit by their answer all material allegations of the complaint, and upon the further reason that the law, as given by the court, is not the law in the case. As to the last clause in this assignment, it has already been discussed and disposed of, and it is unnecessary to go over the same grounds again. That the evidence did not support the verdict we cannot inquire into, for the reason that the bill of exceptions shows affirmatively that all the evidence elicited in the case is not contained therein; and, as to the defendants admitting the material allegations of the complaint, we have only to say that there are no admissions in the answer by which appellants can have any advantage, because the only cause of action stated in the complaint is explicitly and positively denied in the answer, viz., the giving of a warranty of the horses; but, for the errors in the instructions above pointed out, the judgment should be reversed and the cause remanded for further proceedings according to law.

STALLCUP and RISING, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment is reversed and the cause remanded.

Reversed.

FIRST NAT. BANK OF PUEBLO V. NEWTON, IMPEADED,
ETC.

Defendant Newton was a silent partner of the other two defendants, who were ostensible partners. September 15, 1882, a ninety-days note, bearing the firm name, was given to the plaintiff for \$1,500. The firm name was composed of the names of the two ostensible

partners. October 2, 1882, defendant Newton retired from the firm, and another silent partner took his place, but no notice of the change was given and the firm name remained the same. December 16th the note was taken up, marked "Paid" by plaintiff's cashier, and a new note given therefor, bearing the firm name. The cashier testified that the new note was received in payment of the old one. *Held*, in the absence of evidence of an agreement that the new note should be accepted in payment of the old one, the members of the original firm were liable for the debt.

Error to District Court, Pueblo County.

THE facts are stated in the opinion.

Mr. C. E. GAST, for plaintiff in error.

Messrs. PITKIN and RICHMOND, for defendants in error.

MACON, C. In the summer and fall of 1882 the defendants in error were partners, doing business in the city of Pueblo, under the firm name of Todd & Fairchild; defendant Newton being a silent part-member, and Todd & Fairchild the ostensible members. During the months of August and September of that year the firm had overdrawn its account with plaintiff in error to the extent of \$952, and on the 15th day of September of the same year executed a note to the plaintiff, signed by P. B. Fairchild and S. E. Todd, and with the firm name of Todd & Fairchild, for \$1,500, due at ninety days, bearing interest at the rate of one and one-fourth per cent. per month, to secure the overdraft, as well as an additional credit, then and there extended the firm by the bank, of \$542. On October 2, 1882, Newton withdrew from the firm, and one G. J. Piper took his place therein; but no change was made in the firm name. Newton gave no notice of his withdrawal, nor did the firm give any notice of the association of Piper in the partnership; at least none was given to the plaintiff in error. This note of September 15th was not paid at maturity in money, but Todd & Fairchild executed another note to

the bank for the same sum, signing it with the firm name, and with the individual name of P. B. Fairchild, which note was due in ninety days, bore interest at the same rate as the first, which the bank accepted in lieu of the first, surrendering the latter to Todd & Fairchild, and stamping it "Paid." Plaintiff in error was ignorant at this time of the fact that Newton had retired from the firm, or that Piper was a member thereof, and would have refused to accept the new note and surrender the old had it (plaintiff) been advised of these facts. The last note has never been paid.

In September, 1883, the plaintiff in error brought suit in the district court of Pueblo county against defendants in error upon the original indebtedness, averring that on the 15th day of September, 1882, it loaned to said defendants the sum of \$1,500, and that defendants promised to repay the said sum within ninety days, with interest at one and one-fourth per cent. per month; and that said defendants had not paid that sum, nor any part thereof, except the interest up to the 16th day of December, 1882.

Defendant Newton answered (the other defendants not being served with summons), and denied that he was indebted to the plaintiff in any sum for any money loaned to the defendants, or either of them; admitted that he was a member of the firm of Todd & Fairchild on the 15th day of September, 1882, but that he was solely a silent partner in the firm; that his connection therewith was unknown to all persons dealing with the firm; and that when said loan was made, on the 15th day of September, 1882, the plaintiff had no notice or knowledge whatever of his connection with said firm, and that the loan was made without any knowledge or notice on the part of plaintiff that he (Newton) was or would be personally liable for the repayment of the whole or any part of the said loan, as a member of the firm or otherwise; that the loan was made by plaintiff upon the sole credit and responsibility of S. E. Todd, Jr., and P. B. Fairchild; fur-

ther avers that prior to and on the 15th day of September, 1882, and when said loan was made, an agreement existed between the defendant and the other members of the copartnership that no promissory notes should be made, or any firm indebtedness contracted, by any member of the said firm, which would in law bind the said firm, without first obtaining the consent thereto of each and every member thereof; that such agreement was in full force and effect at the time of said loan; that said loan was effected in violation of said agreement, and the same was done without the knowledge or consent of defendant Newton, and against his will. Defendant further alleges in his defense that the said loan was obtained by the firm of Todd & Fairchild, and in its name, for the sole and individual use and benefit of said Fairchild, and that defendant had no notice that said loan had been effected until long after the firm had been dissolved by his withdrawal therefrom, and after the affairs thereof were fully wound up, completed and adjusted between him and the other members of the firm; further avers that, on the 15th day of September, 1882, said Fairchild negotiated said loan, and procured the \$1,500 from plaintiff in the name of, and professedly on behalf of, said firm, but in fact for the sole use and benefit of said Fairchild; "that, as the consideration for such loan upon the part of plaintiff, it (the plaintiff) then and there demanded from and required of said P. B. Fairchild the execution and delivery of a promissory note, to be then and there made by said P. B. Fairchild in the name of said firm, and as a member of the said firm of Todd & Fairchild; that the said note was then and there executed by the said Fairchild to the plaintiff, before the payment of any part of the said sum of \$1,500; that, in pursuance of said requirement on the part of the plaintiff, the said Fairchild then and there made, executed and delivered to plaintiff a promissory note, and the said Fairchild and S. E. Todd then and there signed, as joint makers, the

said firm name of Todd & Fairchild, and the individual names of P. B. Fairchild and S. E. Todd, Jr., by the terms of which note the said makers thereof thereby promise to pay to the order of the plaintiff the said sum of \$1,500, in ninety days from date thereof, with interest thereon at the rate of one and one-fourth per cent. per month from date until paid; that thereupon, on the delivery of said note to the plaintiff, it (the plaintiff) then and there paid the said P. B. Fairchild, or his representative, the said sum of \$1,500, the same being then and there the identical indebtedness and loan referred to in plaintiff's said complaint, and the said note was then and there accepted by the plaintiff in discharge of said indebtedness mentioned in said complaint." It further avers that on the 2d day of October, 1882, the said firm, composed of S. E. Todd, Jr., P. B. Fairchild, and George A. Newton (as silent partner), was dissolved by mutual consent, the said defendant Newton retiring therefrom, and said co-partnership was reconstituted by the association of G. J. Piper in the firm, which new firm became the successor of the old, with the same firm name of Todd & Fairchild; that at the maturity of said note the new firm, on the 16th day of December, 1882, at the request of the plaintiff, executed another promissory note for the sum of \$1,500, payable ninety days after date, to the order of the plaintiff, with interest at one and one-fourth per cent. per month after date until paid; that said promissory note, last and aforesaid, was signed by the firm of Todd & Fairchild, and by P. B. Fairchild in his individual capacity, and as joint maker; that said note was then and there accepted by the plaintiff in full payment and discharge of the first said note, the said firm paying at that time the interest accrued on said first note, and at the same time plaintiff marked upon the note of September 15, 1882, the word "Paid," and delivered the same to the makers thereof; and the last-mentioned note is still outstanding, and in full force and effect, and held and owned by the plaintiff.

To this answer plaintiff filed its replication; averring that at the time of said loan it was informed and believed that the defendant Newton was a partner in said firm; professes ignorance of any agreement between the members of the firm as to giving of promissory notes, or of contracting the firm's indebtedness, so as to bind the firm; denies that said loan of \$1,500 was obtained for the sole individual use and benefit of said Fairchild, but that the same was made for and on behalf and for the use and benefit of said firm; denies that the last note was given and accepted by the plaintiff in full payment and discharge of the note of September 15, 1882; and avers that the said last note was executed merely in renewal of the previous note, and was not intended to be nor was it accepted in payment or discharge thereof.

In September, 1883, the cause was tried to the court without a jury, and the testimony taken in the case shows these facts: That defendant Newton was a silent partner in the firm of Todd & Fairchild; that he retired from the copartnership on the 2d of October, 1882; that the plaintiff in error was not informed by either Newton, Todd or Fairchild of Newton's withdrawal; that no notice of the dissolution of the firm, or of the association of Piper with the firm, was given; that the note of September 15, 1882, was not paid at maturity in money; that a new note, executed on December 16, 1882, was taken by plaintiff in error in ignorance of the fact that Newton was not still a member of the firm, and that Piper was a member; that the note of September 15, 1882, was exchanged for that of September 16th, stamped "Paid," and surrendered to the makers by plaintiff in error, in the belief that no change had occurred in the firm; that the indebtedness of \$1,500, for which the first note was given, was in part, to wit, to the extent of \$952, an overdraft by the firm, occurring some time before the 15th of September; the balance of the \$1,500, to wit, \$548, was a credit extended to the firm by the plaintiff; that Fairchild did not negotiate the loan, nor

did he receive individually any part of it; that the plaintiff in error, at the time of the overdraft, and at the time of the execution of the two notes spoken of, was ignorant of any agreement or arrangement between the members of the firm to the effect that no firm notes or firm indebtedness should be contracted by any member thereof, without the consent of each member. Nothing appeared in the evidence to show that, since the last note was executed, any settlement had been made between defendant in error and his copartners. Plaintiff in error, at the trial, produced and offered to surrender the note of December 16, 1882.

Whether the last note was taken in payment and discharge of the indebtedness there is nothing to show further than the testimony of one Robert Lytle, cashier of plaintiff in error, who was called and examined at the trial (and who was the only witness examined), and testified, in answer to cross-examination, as follows: "*Question.* Is this the note that was taken in satisfaction of the old one? *Answer.* Yes, sir. *Q.* When you surrendered this note of September 15th, and stamped it 'Paid,' you surrendered that and took a new note in satisfaction of the existing indebtedness, did you not? *A.* Yes, sir. *Q.* So at the time you gave up this note of September 15th and marked it 'Paid' you received the interest on it, which is \$57.50, and received the new note in payment of the note of September 15th? *A.* Yes, sir; they gave us a check for \$57.50 on the Stock-Growers' National Bank, and the new note."

Upon these facts the court gave this opinion: "And the court being of the opinion that the surrender of the note of September 15, 1882, and marking it 'Paid,' and receiving the new note of December 16, 1882, constituted a payment in law of the original indebtedness;" and found the issues for the defendant, and entered judgment accordingly,—to which plaintiff excepted, and comes to this court by a writ of error, assigning two

errors, both of which are resolvable into one, and they go directly to the opinion of the court as to the legal effect of the surrender of the old note, marking it 'Paid,' and receiving the new one.

It is insisted by plaintiff in error, and contested by defendant, that a silent partner, when discovered, may be held liable to the debts of his firm contracted while he was such member; and that whether plaintiff in error knew or suspected that defendant Newton was a copartner in the firm of Todd & Fairchild is immaterial,—he can be held for the debts of his firm; that whether the credit was given to him or not is immaterial, if the fact is afterwards discovered that he was at the date of the loan in this case one of said firm.

As a general proposition there can be no doubt of its soundness. Persons dealing with a copartnership trust it as a whole as well as each member thereof. They are under no obligations to inquire who constitute the firm, and it is common that the firm sees fit to conceal the names of some of its members. If one deal with a copartnership, under the impression or belief that certain parties compose it, and afterwards discover his error, he may lose by the mistake, but cannot be heard to complain. On the other hand, if persons in dealing with a copartnership are mistaken in supposing that certain persons are not members thereof, and afterwards discover their mistake, they may have the benefit of the mistake in their increased security.

In *Winship v. Bank of the United States*, 9 Curt. Dec., 466, Marshall, C. J., says: "The counsel for the plaintiff in error supposes that, though these principles may be applicable to an open and avowed partnership, they are inapplicable to one that is secret. Can this distinction be maintained? If it could, there would be a difference between the responsibility of a dormant partner and one whose name was to the articles. But their responsibility in all partnership transactions is admitted to be the

same. * * * The responsibility of unavowed partners depends on the general principles of commercial law, and not on the stipulations of the articles."

In *Bigelow v. Elliot*, 1 Cliff. 38, it is said that "persons who jointly participate in profits of trade or business ostensibly carried on by another for his sole use and benefit, within the principles already explained, are equally liable, when discovered, with the ostensible and active owner, to all creditors of the concern whose debts were contracted during the time of such participation, without the knowledge of the same, or of the actual relations between the parties at the time the credit was given; and that liability exists notwithstanding the parties may have privately stipulated that they shall not be partners, and in contemplation of law really are not such as between themselves. * * * Dormant or secret partners are held liable, under such circumstances, partly on the ground that every man who has a share in the profits of a trade or business ought also to bear his share of the loss, and partly on the ground of policy and necessity to prevent bad faith in secret arrangements; as all experience has shown that if the rule were otherwise third persons might be exposed to numberless frauds."

In *Bourdeaux v. Martinez*, 25 La. Ann. 169, the doctrine was laid down in this language: "The liability of secret or dormant partners in commercial partnerships, in all cases like the present, is so well established, and so universally recognized, that authorities need scarcely be referred to." *McDonald v. Clough*, ante, p. 59.

In the case of a dormant or secret partner, the credit is manifestly given only to the ostensible partner, for no other partner is known. Still, however, it is not treated as an exclusive credit; for the law in all cases of this sort founds its decision upon the ground that the creditor has had a choice or election of his debtor, which cannot be where the partner is dormant or unknown. The credit, therefore, is not deemed exclusive, but binding upon all

for whom the partner acts, if done in their business, and for their benefit, as in cases of agencies for an unknown principal.

In the case of *Seawell v. Payne*, 5 La. Ann. 255, this court said, in relation to deceit practiced by one partner upon another: "The validity of the transactions between the bank and the parties who effected the loan and consented to its application is not affected by the state of affairs between the partners *inter se*. A deceit between partners has nothing to do with their obligations towards third persons, who are not privy to it, and is no evidence of any connivance on the part of the bank."

These decisions—and many more to the same effect might be cited—cover both the ground of the liability of a silent partner and the inefficacy of secret arrangements between partners to affect their customers dealing with them in ignorance of such secret arrangement; and as nothing appeared in evidence to show any secret arrangements between the parties in this case, as is alleged in the answer, or that plaintiff in error had knowledge of any such, if they existed, we must look to other rules of law upon which to sustain the judgment in this case, if it is to be sustained.

The only point upon which defendant in error relies, in support of the judgment of the court below, which the evidence in the case authorized him to urge, is that the note of December 16, 1882, was an extinguishment of the note of September 15, 1882, and of the original indebtedness. In order to understand the effect of this transaction, it is necessary to ascertain what the cases have held to be the legal effect of the giving of a promissory note for a precedent debt. In this case the last note was given as a renewal of the first, by which act the first note was extinguished, and all right of action upon the same was extinguished with the note. The note was but evidence of the indebtedness, not the indebtedness itself. While the note was current, the right of action upon the

original indebtedness was suspended, and no suit could have been maintained upon such original debt. Byles, Bills, 304; *Okie v. Spencer*, 2 Amer. Lead. Cas. 275; *Stedman v. Gooch*, 1 Esp. 4; *Price v. Price*, 16 Mees. & W. 231, 239.

The giving of the debtor's own note, bill or check, or the note, bill or check of a third person, to meet an antecedent indebtedness, is *prima facie* not a payment or discharge of such indebtedness. *Collins v. Dawley*, 4 Colo. 141; *Hart v. Boller*, 15 Serg. & R. 162; *Sutton v. The Albatross*, 2 Wall. Jr. 372; *Woodward v. Miles*, 4 Fost. 289; *Fickling v. Brewer*, 38 Ala. 685; *White v. Jones*, 38 Ill. 159; *Matthews v. Dare*, 20 Md. 248; *Schilling v. Durst*, 42 Pa. St. 126; *Smith v. Smith*, 7 Fost. 244; *McMurray v. Taylor*, 30 Mo. 263; *Hayes v. Pollock*, 1 Pa. St. 376; *Kephart v. Buttcher*, 17 Iowa, 240; *Welch v. Allington*, 23 Cal. 322; *Peter v. Beverly*, 10 Pet. 562, 568; *Sheehy v. Mandeville*, 6 Cranch, 253; *The Kimball*, 3 Wall. 45.

In the last case, Field, J., speaking for the court, holds the following language: "By the general commercial law, as well of England as of the United States, a promissory note does not discharge the debt for which it is given, unless such be the express agreement of the parties. It only operates to extend until its maturity the period of the payment of the debt. The creditor may return the note when dishonored, and proceed upon the original debt. The acceptance of the note is considered as accompanied with the condition of its payment. Thus it was said as long ago as the time of Lord Holt that 'a bill shall never go in discharge of a precedent debt, except it be a part of the contract that it should be so.' Such has been the rule in England ever since; and the same rule prevails, with few exceptions, in the United States. The doctrine proceeds upon the obvious ground that nothing can justly be considered as payment in fact but that which is in truth such, unless something else is expressly agreed to be received in its place. That a mere promise

to pay cannot of itself be regarded as an effective payment is manifest."

The presumption that the note of the debtor, or of a third person, given for an antecedent debt, is not payment of the same, is so strong that it is held that though a receipt in full be given at the same time that such note is accepted by a creditor, the same is construed to be upon the condition that the note shall be paid at maturity. *McIntyre v. Kennedy*, 29 Pa. St. 448; *Perit v. Pittfield*, 5 Rawle, 166; *McGinn v. Holmes*, 2 Watts, 121; *Tobey v. Barber*, 5 Johns. 68; *Johnson v. Weed*, 9 Johns. 310; *Roget v. Merrit*, 2 Caines, 117; *Maze v. Miller*, 1 Wash. C. C. 328; *Harris v. Lindsay*, 4 Wash. C. C. 271; *Peter v. Beverly*, *supra*; *Glenn v. Smith*, 2 Gill & J. 494; *Berry v. Griffin*, 10 Md. 27; *Wheeler v. Schroeder*, 4 R. I. 383, 389; *Street v. Hall*, 29 Vt. 165; *Johnson v. Cleaves*, 15 N. H. 332; *Sutton v. The Albatross*, *supra*; *Sheehy v. Mandeville*, *supra*.

The burden of proof is upon the debtor to show that such note was taken as payment of the original indebtedness. *Noel v. Murray*, 13 N. Y. 168; *Leas v. James*, 10 Serg. & R. 307, 315; *White v. Jones*, 38 Ill. 159; *Woodward v. Miles*, 4 Fost. 289.

If, then, as the authorities clearly hold, a note is not to be taken as payment of a debt it evidences, without further proof that it was so intended, does the evidence in this case make out that fact for defendant in error? At the outset of this inquiry it may be said that this court will not disturb the verdict of the jury, nor the finding of the court, on the evidence, except in extreme cases. This rule we have no disposition to set aside or evade; but the court below did not find that the evidence showed an *agreement* to accept the new note in payment of the debt of which the old note was evidence, but that, in the absence of any agreement to that effect, as matter of law, the transaction amounted to a payment of the debt. Hence there is no necessity for a review of

the finding of the facts upon the evidence by the district court. The only question is, did that court err in holding that the transaction, by which the new note was substituted for the old, amounted in law, independently of agreement and intention, to a payment of the debt due plaintiff in error from the firm of Todd & Fairchild, on or before the 15th day of September, 1882. In the light of the decided cases upon this question, the district court unquestionably erred in its ruling upon this point.

But it is insisted by defendant in error that the evidence of the witness Lytle clearly establishes that the second note was received by the creditor in full payment, satisfaction and discharge of the first. We do not think the testimony of Lytle warrants such a conclusion. This testimony shows the usual bank transaction, where a party, unable to pay his note at maturity, takes it up and gives a new one. While the second note was received in lieu of the first, it does not appear that it was distinctly understood and agreed that it was in satisfaction of the original indebtedness in any such sense as destroyed its existence, or precluded an action upon it.

The only other contention of defendant is that, by reason of the surrender of the note of September 15th, and stamping it "Paid," plaintiff in error is estopped to proceed against Newton upon the original indebtedness; because Newton, having settled with his copartners upon the basis of their having paid this note, which he found in their possession, cannot now be called upon to pay it to the plaintiff in error. It is unnecessary to enter into a discussion of this proposition, because there is no evidence in the record that any settlement has ever been had between Newton and his copartners upon any such basis, and, in the absence of such evidence, a discussion of the rules of law which might govern the case, if such settlement had been made, would be outside of the issue, and would have no binding force in any subsequent case.

The district court erred in rendering judgment for the defendants, and the judgment should be reversed.

RISING and STALLCUP, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment is reversed and the cause remanded.

Reversed.

HURD ET AL. V. HAMILL ET AL.

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1. Under the statute of 1877, a purchaser at a tax sale is protected against the mistakes of the assessor or other official, and the liability of the county to the purchaser cannot be made to depend upon the liability of the officer to the county. The liability of the county is created by the mistake of the officer; when created its enforcement is not made to depend upon any contingency.
2. If a county is possibly liable to a purchaser at tax sale for failure of his title, the county commissioners may assume the defense of a suit against such purchaser and the county treasurer, to test the title, and, in such case, the county will be liable for the costs and lawyer's fees.

Appeal from District Court, Clear Creek County.

THE facts are stated in the opinion.

Messrs. L. C. ROCKWELL and W. T. HUGHES, for appellants.

Messrs. MORRISON and FILLIUS and THOS. J. CANTLIN, for appellees.

RISING, C. At a tax sale made by the county treasurer of Clear Creek county, in December, 1877, the defendant Hamill became the purchaser of certain premises, upon which taxes had been levied as the property of William H. Cushman, paying therefor the sum of \$3,928.09, being the amount of taxes, interest and penalty, and thereupon

said county treasurer made and delivered to said Hamill a certificate of sale for said premises. In an action brought by John B. Trevor and James B. Colgate against said Hamill and Lewis L. Roberts, as county treasurer of said county, in the circuit court of the United States for the district of Colorado, a decree was entered on the 27th day of May, 1881, adjudging and decreeing that the assessment upon which the taxes were levied upon said premises for the year 1876 was void, and the sale void, and that the tax certificates issued thereon should be canceled, and for naught held. On June 8, 1881, said Hamill presented to the board of county commissioners of Clear Creek county a bill against said county for the sum of \$3,928.09, with interest thereon at twenty-five per cent. per annum from the 3d day of December, 1877; the said sum of \$3,928.09 being the amount paid by said Hamill at tax sale for the premises described in the tax certificates ordered canceled by decree of the court. The board of commissioners allowed said bill to the amount of \$4,058.50, for the county and state proportion of the money to be refunded to said Hamill on account of said illegal tax sale, and issued a county order to said Hamill for said sum. On April 1, 1881, Morrison & Fillius presented to said board of county commissioners a bill against said county, for the sum of \$200, for legal services and expenses rendered and expended in the suit brought by Trevor and Colgate against Hamill and Roberts, and the same was allowed, and an order issued therefor April 6, 1881. On June 1, 1881, the bill of Edward F. Bishop, clerk of the United States court, against the defendants in said action of Trevor and Colgate against Hamill and Roberts, for the costs in said case, was presented to said board of commissioners for allowance, and the same allowed, and an order issued therefor for the sum of \$60.10. This action was brought to restrain the board of county commissioners from levying, and the county treasurer from collecting, a tax to pay said orders issued to said William A. Hamill, Morri-

son & Fillius, and W. F. Bishop; and to obtain a decree directing said board of county commissioners to pass resolutions rescinding the action of said board in the allowance of said bills, and the issuance of said orders. Upon trial, judgment dismissing the complaint, and against the plaintiffs for costs.

The only question raised by the assignment of errors is, Was the allowance of said bills, and the issuance of county orders therefor, authorized by the law of the land?

As to the bill of William A. Hamill, we think the action of the board of county commissioners was authorized by, and was in conformity with, the provisions of section 2345 of the General Laws of 1877, which are as follows: "When, by mistake or wrongful act of the treasurer, clerk or assessor, or from double assessment, land has been sold on which no tax was due at the time, the county shall hold the purchaser harmless, by paying him the amount of principal and interest at the rate of twenty-five per cent. per annum; and the treasurer, clerk or assessor, as the case may be, and his sureties on his official bond, shall be liable to the county for all losses sustained by the county from sales made through their mistakes or misconduct." It is conceded by appellants that the assessment of the Cushman property was void by reason of an error of the assessor in making an assessment of the same in 1876, but it is claimed by appellants that the provisions of the statute quoted do not affect this case, for the reason that the statute was not in force until March 20, 1877. The argument of appellants is that the intent of the law-making power was to hold the county harmless, as well as the purchaser at tax sale, and that this intent is evidenced by the provision in the statute making the officers of the county therein named liable to the county for all losses sustained by reason of its liability to the purchaser at tax sales. If, therefore, the officer, by whose error or mistake the tax proceedings

were invalidated, cannot be held liable to the county, under the statute, for such error or mistake, then the county cannot be held liable to the purchaser; that as the assessment, which was invalidated by the error of the assessor, was made before the act of 1877 took effect, the assessor cannot be held liable to the county under the statute, and for that reason the county cannot be held liable in this case. We do not think the argument well founded. The statute had taken effect, and was in force, at the time Hamill became the purchaser at tax sale. The provisions of the statute must be held to apply to such sales. The statute being in force when the sale was made, the purchaser is protected by its provisions, and the liability of the county to him cannot be made to depend upon the liability of the officer who made the mistake or committed the error to the county. The liability of the county is created by the mistake or wrongful act of its officers. When created, its enforcement is not made to depend upon any contingency. The provision of the statute, making the officers liable, shows the intent to save the county harmless, but it does not show an intent to make the liability of the county depend upon the liability of the officers.

It appears from the evidence that the county employed the law firm of Morrison & Fillius to assist the county attorney in the defense of the suit brought against Hamill and Roberts by Trevor and Colgate. By reason of the possible liability of the county to the holder of the tax certificates sought to be canceled by said suit, the county had such an interest in that litigation that it was the duty of the board of county commissioners to do all that could be done to sustain the validity of the tax certificates. It also appears from the evidence that Hamill tendered the defense of said action to the county, and that the county made the defense by its board of commissioners. Under the law, the board of commissioners, in the proper discharge of their duties, could not have done less; and it

follows that the county is liable for services and expenses of the counsel it employed, and for the costs in the case, the defense of which it assumed.

The judgment should be affirmed.

MACON and STALLCUP, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment is affirmed.

Affirmed.

BURLINGTON & C. R. Co. v. SCHWEIKART.

1. In a proceeding to set aside a report of commissioners awarding compensation and damages in a proceeding condemning lands for railroad purposes, it was alleged that an agreement granting a right of way over certain adjoining land, procured by the railroad company for the benefit of the owners injured, thereby connecting and improving the lands sought to be condemned, had not been taken in consideration by the commissioners in making their report. *Held*, that as such agreement was only a few months old, had not been recorded, nor in any way brought to the attention of the public, and there had been no use of the way by the public, it was of no effect as a dedication such as could benefit the owner. Nor can it be said that by virtue of such an agreement an easement attached, as appurtenant to the land sought to be condemned.
2. The constitution of Colorado (article 2, § 15), and the eminent domain act (Code Civil Proc., 74), contemplate a compensation in money to one whose lands are condemned for railroad purposes, and therefore, being inadmissible to reduce his compensation, the commissioners had no power to consider the agreement. The acceptance of such privilege cannot be compelled, but depends on the consent of the parties.

Appeal from District Court, Arapahoe County.

THIS is an appeal from a decree made December 9, 1882, by the district court of the second judicial district, sitting within and for the county of Arapahoe, in a proceeding instituted by appellant to condemn the lands of appellee for railroad purposes. The appellant is a body corporate cre-

ated for the purpose of constructing and operating a railroad from Denver to the boundary line between the states of Colorado and Nebraska. The appellee is the owner of a tract of land containing about thirteen acres lying northerly of appellant's main line, and east and just beyond that portion of the city of Denver known as Elyria. Upon these premises appellee has a house and some other buildings. Near and in the vicinity of the house there is a small park and two natural lakes, and it is claimed that these and other attractions make the property valuable as a place of public resort. Before this proceeding was begun there was no access to this tract of land from any public highway or street. The adjoining lands were either a part of the public domain, or the fee was vested in individual proprietors, subject to no way or easement for appellee's benefit. To obviate this difficulty, appellee had purchased a strip of land one thousand three hundred feet or more in length, and about twenty feet in width. This strip of land ran along or near the southerly line of the southeast quarter of section 14, township 3 south, of range 6S west of the sixth principal meridian, to the corner of said section 14; and thence at right angles along the westerly line of said quarter section to a county road. By means of this strip, appellee had access from his premises to a highway. Appellant's main line crosses this strip about one thousand feet from appellee's premises, and this proceeding was instituted to condemn the small fraction of an acre (sixty-five thousandths) thus taken. At the point of intersection between the railroad and this strip of land there is a cut about twelve feet in depth. To use the strip as a way would require a considerable outlay, as it would be necessary either to construct a bridge, or, by excavating, to cross appellant's road-bed at grade.

It was claimed that, for the purpose of providing appellee a means of access to his premises, and thereby removing any inconvenience suffered by him by crossing

his intended way, appellant had obtained a grant of a strip of land fifty feet in width, which ran from the entrance to appellee's premises, in a straight line to a public and traveled street of the city of Denver, and that the means of ingress and egress thus provided to appellee was preferable to the narrow way which he had purchased, for the reasons that it was thirty feet wider, shorter by several hundred feet, and connected with a public street at a point very much nearer the city.

The alleged grant is as follows:

"That the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned to be done, kept and performed by the said party of the second part, hereby grants, with said party of the second part, his successors and assigns, a right of way, for the use of the party of the first part, any and all persons, as a public highway," the following described parcels of land: Beginning, etc. (description of land),—to have and hold the same for the uses and purposes aforesaid. "And the said the Burlington & Colorado Railroad Company hereby agrees to and with said first party to grade said parcels as a highway, so that there shall be a gradual slope from the one hundred feet strip in width upon the line of the Burlington & Colorado Railroad, either way, to the extremities of the parcels aforesaid, and to make a good and sufficient roadway across said one hundred feet strip.

"In witness whereof," etc.

"JOHN A. CLOUGH. [SEAL.]

"J. B. WESTON, [SEAL.]

"Special Agent of the Burlington & Colorado Railroad Company."

This instrument was introduced by appellant, and read in evidence before the commissioners, to be by them considered in determining the question whether appellee's premises were injured by crossing his proposed private way.

The commissioners reported (1) that the land above described to be taken by plaintiff as aforesaid, and which was owned by defendant, is of the value of \$31.50; (2) that the damage which results from the construction of said road, and the taking of said parcel of land by plaintiff, to the residue of the land of the defendant from which said parcel is taken, is \$919.50; (3) that there is no benefit to the defendant in the premises, and we therefore report none.

Upon the coming in of this report a motion was filed in behalf of the appellant to set the same aside for the following among other reasons: (1) That said certificate of ascertainment and assessment was made by the commissioners aforesaid under a misapprehension of the law and the facts, in this, to wit: that the said commissioners, and each of them, supposed, at the time when they were deciding on the award to be made in the proceedings herein, that the roadway which it had been testified the petitioner had offered to defendant was not one which defendant could freely use, when in truth and in fact said roadway had been deeded by one John A. Clough to petitioner and its assigns for the use of the public as a highway, and the fact that it had been so deeded was in evidence before said commissioners, and when it was further in evidence that defendant knew of such conveyance long before the beginning of these proceedings.

The report of the commissioners was accompanied by the evidence taken upon the hearing before them. Upon the hearing of the motion to set aside the report, the evidence in the cause was presented to the court, and petitioner, by its counsel, offered the testimony of George C. Roberts and George D. Norton, Jr., being two of the commissioners who made the same, to prove that the said board of commissioners had, through and by error and mistake, proceeded upon erroneous and illegal principles in making their said report and the award therein contained, in this, to wit: that said commissioners did not

consider, in making their said award and certificate, the agreement to convey to petitioner a strip of land to be taken, which said agreement was entered into between said petitioner and one John A. Clough, and is attached to the testimony, as hereinbefore appears, nor the offer made by petitioner to defendant of the use of said strip, but that the said commissioners rejected the same, and did not consider either said agreement or said offer in making their said award; and that said commissioners did not consider, in determining upon the amount of their said award, the fact that, by the terms of the agreement aforesaid, there was provided for defendant a road which would render unnecessary any expenditure by defendant in making any excavations as set out in the evidence of defendant hereinbefore fully set forth; and to further prove, by the testimony of said Roberts and Norton, that the award in said certificate contained was for an amount much larger than the said commissioners would have agreed upon had they proceeded upon correct and legal principles in their determination of the matters to them presented, to wit, the damages to be sustained by defendant by reason of the taking of the lands in the petition herein described. Objection was interposed to the introduction of this testimony by appellee's counsel, and objection was sustained and evidence excluded.

Mr. EDWARD O. WOLCOTT, for appellant.

Mr. H. E. LUTHE, for appellees.

ELBERT, J. Whether the existence of a public highway, affording ingress and egress to and from the premises of the defendant, would have been a fact to be considered by the commissioners in estimating the defendant's damages resulting from the destruction of his private way by the appellant company, is an inquiry we need not enter upon. We are of the opinion that no such public way existed. It is not claimed that the

agreement between Clough and the appellant company resulted in the establishment of a public way under the statute concerning highways in force at the date of the agreement. Gen. Laws, § 2375. This statute deals only with highways established in accordance with law. Nor can it be said that the agreement in question resulted in the establishment of a public way by dedication. In such case acceptance by the public is as essential as appropriation by the owner of the fee. Ang. Highw. § 157. The agreement bears date January 20, 1882, and was offered in evidence before the commissioners June 29, 1882. It does not appear to have been recorded, or in any other way brought to the attention or knowledge of the public, nor had there been any use of the premises as a way by the public. So far as the public at large was concerned it was an unknown and unaccepted appropriation. The agreement appears to have remained in the possession and under the control of the appellant company, and was subject to surrender and cancellation by the parties thereto. Washb. Easem. 139, and cases cited. Nor can it be said that, by virtue of the agreement, an easement attached as appurtenant to the estate of the appellee. Such an easement lies only in grant, or by implication of grant, or by prescription which supposes a grant by the owner of a servient estate, upon which the obligation rests, to the owner of a dominant estate, to which the right belongs. A parol license is insufficient. Washb. Easem. pp. 3, 6, 18, 28. The offer of the appellant company, through its agent, McCullough, to allow the defendant a right of way over the premises mentioned in the Clough agreement, was a mere verbal license, revocable at will. Washb. Easem. 5, 19.

It is claimed, however, that had this right of way offered to the defendant by the appellant company been considered by the commissioners in estimating and determining the damages to which the defendant was entitled, that the defendant would thereby have acquired a

right of way over the premises mentioned in the agreement by estoppel. It is unnecessary to go into the question of estoppel. Upon the part of the appellant company this was substantially a proposition to compensate the defendant, either in whole or in part, his damages for the destruction of his private way, by giving him another way which it claimed would equally serve his purpose. It is sufficient answer to say that the constitution (sec. 15, art. 2), and the eminent domain act (Code Civil Proc. 74), clearly contemplate compensation in money. It follows that the right of way over other premises offered by the appellant company was not an admissible compensation, either in whole or in part, under the constitution or the statute. In the absence of the assent of the parties, the commissioners had no power to consider the offer, or allow for it in their assessment of damages. As said in the case of *Hill v. Mohawk & H. R. Co.* 7 N. Y. 157: "Privileges of this kind must depend upon the agreement of the parties. The appraisers had no authority in the premises. They could neither compel the corporation to make the agreement, nor the owner to accept it." *Chicago, M. & St. P. R. Co. v. Melville*, 66 Ill. 329; *Chesapeake & O. R'y Co. v. Patton*, 6 W. Va. 147; *Railroad Co. v. Halstead*, 7 W. Va. 301; *In re Morse*, 18 Pick. 443; *Central O. R. Co. v. Holler*, 7 Ohio St. 222.

The court did not err in refusing to set aside the report of the commissioners on the ground assigned. The judgment of the court below is affirmed.

Affirmed.

10	184
10	202
10	184
19	593

TOWN OF ASPEN V. RUCKER ET AL.

1. The legislature is authorized to make all needful rules and regulations for the execution of the trust, concerning town sites, and the appropriation of the proceeds of sale of the trust estate, including the power to direct sales.

2. The trustee is required, under the statute, to execute deeds to occupants of the town site of the lots to which they are entitled, upon their compliance with the local rules and regulations. But only residents and actual occupants and their assigns are entitled to demand deeds from the trustee by virtue of the act of congress.
3. Purchasers of vacant or forfeited lots in the town site, at sales regularly made pursuant to statute, are entitled to conveyance from the trustee.
4. The courts also have powers in the premises, which may, in proper cases, be called into exercise. But neither the legislature nor the courts are authorized to change the character of the estate granted by the government from an estate in trust to one in fee-simple, save by conveyance to beneficiaries who have complied with the law, or by *bona fide* sales made by the trustee under such regulations as the legislature may prescribe.
5. The construction given by the courts of this state to the act of congress is that the town site is required to be held in trust until finally disposed of as trust property. The purpose of the acts of congress was to vest the estate and trust powers, not in the corporation itself, but in the trustee in his official or politic capacity, and to limit it to the successor in trust, until the trust should be finally exhausted.
6. An entry in the name of the corporate officials of a town cannot, by construction of law, inure to vest the estate in the corporation.
7. A corporation may maintain a bill to prevent an abuse of the trust when abuse is imminent.

ELBERT, J., dissenting.

Appeal from District Court, Garfield County.

THIS chancery proceeding was instituted by the town of Aspen, in Pitkin county, against the above-named defendants, who are residents of the same county. The purposes of the bill are: *First*, to obtain an injunction to restrain said county judge from conveying a portion of the town site of the town of Aspen to the defendant, the Aspen Town & Land Company; and, *second*, for a decree adjudging the complainant to be the owner of the real estate claimed by the said corporation defendant.

The facts upon which the prayers for relief are based are as follows: That the town site of the town of Aspen was entered in the United States land office by J. W. Deane, then county judge of said Pitkin county, on the

2d day of June, 1881, in trust for the several use and benefit of the occupants thereof; that public notices of the entry were given and published by said county judge, as required by law; and that, within the time prescribed by law for the presentation of claims for lots and parcels of ground within said town site, the said town and land company, defendant, presented to said county judge a statement of particular parcels of land situate therein, in which it claimed an interest. It further alleges that no other applications have been received by the county judge or his successors in office for deeds to the parcels of land described in the bill and claimed by said town and land company. Another allegation is that the last-mentioned defendant has demanded a deed of the lots, blocks and parcels of land so claimed by it from the defendant Rucker, as county judge and successor in trust to the patentee of said town site, and that, unless restrained by injunction, he will execute and deliver deeds therefor to said town and land company. It alleges that said town and land company is not entitled to a deed for any portion of said lands for the following among other reasons, to wit: "That the said the Aspen Town & Land Company was not on the 2d day of June, A. D. 1881, nor on the 29th day of July, A. D. 1881, when it delivered its statement of claim into the office of the said J. W. Deane, county judge, as hereinbefore set forth, the occupant of, or in the possession of, or entitled to the occupancy or possession of, said above-described real estate, or any lot, block, share or parcel thereof, but filed said statement for the purpose of speculation only. * * * That said corporation was organized, as plaintiff is informed and verily believes, for the sole purpose of attempting to obtain title to said town site of Aspen and speculate in town lots in said town site; and plaintiff is advised that such object is not authorized by law." The alleged ownership of the complainant is based upon the allegations that no valid claims have been presented for

the lands in controversy, and that more than three months have elapsed since the time for filing statements of claims expired. Upon these statements of fact, and the preceding statement, that the town and land company was not qualified to claim title, the complainant avers that the real estate described in the bill now belongs to it as the town of Aspen.

A temporary injunction was ordered to issue as prayed for in the bill, upon the filing thereof. The defendants demurred to the bill, alleging ambiguity and informality, and that it did not state facts sufficient to constitute a cause of action. The district court sustained the demurrer and dismissed the bill.

Messrs. A. HEIMS, L. S. DIXON and C. J. HUGHES, for appellant.

Messrs. TAYLOR and ASHTON and J. M. DOWNING, for appellees.

BECK, C. J. In so far as the bill alleges the ownership of the lots and blocks in controversy to be in the town of Aspen as a corporation, and seeks to have the title so adjudged by a judicial decree, its demands are not warranted either by the law or the facts of the case. It is true the legislative act of March 1, 1881 (Laws 1881, p. 239, § 4), contains a provision which would appear to sustain the claim here made, but the adjudications of this and other courts are to the effect that the act of congress approved March 2, 1867, under which the entry in this case was made, will not bear such an interpretation.

The last clause of section 4 of the legislative act provides: "In case any lots in such town remain unclaimed and unconveyed at the end of said ninety days, all such lots shall revert to and become the property of such town." Section 27 also provides, on failure of persons or associations of persons entitled to lots and parcels of land to pay certain fees and charges within the time therein

prescribed, that they shall be deemed to have relinquished all right, title, interest or estate therein, and the corporate authorities shall thereafter be deemed to be seized of the title thereto in fee-simple absolute, discharged of the trust. The language of the act of congress, authorizing the entry, however, and the language of the grant as well, is to the effect that the title to the property conveyed by the government patent is to be held in trust for the several use and benefit of the occupants of the town site.

The mistake of the complainant in this case seems to have been, either in overestimating the power of the state legislature, or in misconstruing the provisions of the act of March 1, 1881. This body is authorized to make all needful rules and regulations for the execution of the trust, and the appropriation of the proceeds of sale of the trust estate. This includes power to direct sales of the entire trust estate, saving and excepting the lands used for streets, alleys, parks and other public purposes. The trustee is required to execute deeds to the occupants of the town site of the lots or parcels of land to which they are entitled, upon their compliance with the local rules and regulations. But only residents and actual occupants and their assigns are entitled to demand deeds from the trustee by virtue of the act of congress. Purchasers of vacant or forfeited lots and parcels in the town site, at sales regularly made pursuant to statute, are likewise entitled to conveyances from the trustee or person invested with the title thereto. The courts also have powers in the premises, which may, in proper cases, be called into exercise. They have jurisdiction to determine controversies between adverse claimants, and to enforce the rights of legal claimants. But neither the legislature nor the courts are authorized to change the character of the estate granted by the government, from an estate in trust to one in fee-simple, save in the manner above mentioned; that is to say: *First*, by conveyances to beneficiaries, who

have complied with the law; *second*, by *bona fide* sales made by the trustee under such regulations as the legislature may prescribe.

The construction given by the courts of this state to the acts of congress is that the entire town site is required to be held in trust until finally disposed of as trust property. It was held in *City of Denver v. Kent*, 1 Colo. 336, that those portions to which no valid claims exist in favor of individual occupants are to be held in trust for the occupants collectively, as a community. It was again held in *Georgetown v. Glaze*, 3 Colo. 234, and also in similar terms in *Smith v. Pipe*, id. 187, to have been the purpose of the acts of congress to vest the estate and trust powers, not in the corporation itself, but in the trustee or trustees, in his or their official or politic capacity, and to limit it to the successor in trust, until the trust should be finally exhausted. The court further held that an entry in the name of the corporate officials of a town could not, by construction of law, inure to vest the estate in the corporation, and that no such intent was manifest in the act. The foregoing views and decisions are sustained by *Lechler v. Chapin*, 12 Nev. 65; *Town Co. v. Maris*, 11 Kan. 128; and many other cases therein cited.

The complainant in the present case, the town of Aspen, misconstrued the act of congress when it declared, in the complaint filed herein, that "*the real estate herein described belongs to it as the town of Aspen.*" Upon consideration of the pleadings, therefore, consisting of the bill and the demurrer thereto (and there is nothing more before us in this case, save the order for the temporary writ of injunction, and the subsequent judgment of the court dissolving the judgment and dismissing the bill), we are of opinion that this branch of the bill, as framed, presents no ground for equitable relief.

We will now inquire whether the complainant was entitled to injunctive relief upon the facts and circumstances stated in the bill. The allegations of the bill,

that the defendant, the Aspen Town & Land Company, presented its statement to the trustee, claiming to be entitled to lots, blocks and parcels of land described in the bill, and that it is not, and never was, an occupant or in possession of any portion thereof, and that said defendant, the county judge of Pitkin county, who holds the title to such lots and parcels of land in trust, will execute a deed therefor to said claimant, unless restrained by injunction, is conclusive of this question. These are material allegations of fact, and they are admitted to be true by the demurrer of the defendants. Upon the pleadings, therefore, the town and land company is clearly not a beneficiary of the trust. It acquired no right to a conveyance by the statement presented to, nor the demand for a deed made upon, the trustee. *Sherry v. Sampson*, 11 Kan. 615; *Lechler v. Chapin*, 12 Nev. 65-72; *Carson v. Smith*, 12 Minn. 560 (Gil. 458); *Leech v. Rauch*, 3 Minn. 448 (Gil. 332); *In re Selby*, 6 Mich. 193; *Town Co. v. Maris*, 11 Kan. 148. As held in *Bingham v. City of Walla Walla*, 13 Pac. Rep. 408, it was the duty of the court to control the action of the trustee, during the pendency of the trust, against acts prejudicial to the rights of the *cestui que trust*. If the corporation may maintain its bill to *correct* an abuse of the trust which affects the common interest of all the beneficiaries, as held in *Georgetown v. Glaze* and *City of Denver v. Kent*, *supra*, it may with equal propriety maintain a bill to *prevent* such an abuse, when the same is imminent.

It follows that the district court erred in sustaining the demurrer to the whole bill of complaint, and in dismissing the bill. For the reasons assigned, the judgment is reversed and the cause remanded.

Reversed.

ELBERT, J., dissenting.

MAYOR OF THE TOWN OF ASPEN V. ASPEN TOWN &
LAND COMPANY.

10	191
1a	68
2a	64
2a	270

1. The writ of *mandamus* should never issue unless the party applying for it shall show a clear legal right to have the thing sought by it to be done in the manner and by the person sought to be coerced. It must not only be in the power of such person, but it must be his duty to perform the act sought to be done.
2. A patent must be construed according to the act of congress authorizing its issuance; and while the recitals therein set forth may indicate the views of the government officers respecting the rights of the parties, the form and manner of executing the patent must be in conformity to the laws of congress.
3. A patent cannot be attacked collaterally.
4. No claimant of lots comprising a portion of a town site is a beneficiary of the trust, or entitled to conveyance without proof of actual occupation, either by the claimant or his grantors, whether such claimant be an individual or a town company.
5. The legislature, in prescribing rules for the execution of the trust, cannot change it by substituting other parties to receive its benefits than those indicated by the law of congress.
6. The law was made for the benefit of the occupants of the town, and not for speculators.

ELBERT, J., dissenting.

Appeal from District Court, Garfield County.

THE case presented by this record is a proceeding by *mandamus* on part of the Aspen Town & Land Company against the mayor and board of trustees of the town of Aspen, to compel said corporate authorities to issue a deed to the plaintiff for a considerable portion of the lots and blocks comprising the town site of said town, the same being located in the county of Pitkin. The plaintiff's petition in this case sets out the history of the entry of said town site by J. W. Deane, county judge of said Pitkin county, the organization of the plaintiff as a corporation, with power to take, enter, hold, sell and convey real estate prior to said entry, and alleging compliance on its part with the provisions of the legislative act of March 1, 1881, relating to the presentation of its claims to said

county judge, for the lots and blocks described in the petition. It states "that the specified right, interest and estate which * * * petitioner claimed in the parts and parcels of land described in the statement in writing, and hereinafter particularly set forth and described, was the right to occupy and possess such parcels, parts and tracts of land, and to be entitled to receive a deed from such county judge, conveying to it the legal title to such parcels or parts of land, and the right to, and to be the owner of, the title in fee thereto." The effect of the order of the secretary of the interior is averred to be that the trust created by the original entry by Deane became and is now vested in the mayor and corporate authorities, and that, under the state statute, the plaintiff, on payment of costs and charges required by law, became entitled to a deed of conveyance of the lands claimed, there being no contesting claimant. It is alleged that Deane's term of office as county judge has long since expired; that he was succeeded in said office by J. H. King, and he by Thomas A. Rucker, who, at the time of filing the petition, was the present judge of said county court, and that, though often requested, none of said county judges have ever conveyed to plaintiff said lots and blocks, or any part thereof. A demand on the corporate authorities of the town of Aspen for a deed thereto is alleged to have been made by plaintiff on the 14th day of November, 1884, which was also refused. Upon filing this petition, an alternative writ of *mandamus* was ordered to the city authorities, respondents, commanding them to convey by good and sufficient deed or deeds of conveyance the lands described, in accordance with the prayer of the petition, or to show cause, within a given number of days, why they had not done so. The respondents made return to said writ by answer under oath, as required by statute, denying most of the material averments of the petition, including the allegation that the petitioner had no plain, speedy or adequate

remedy in the ordinary course of law. They likewise made the following, among other allegations of fact, to wit: "And respondents further allege that the petitioner is not now and never was an occupant of the lots and parcels of lots described in the petition herein. And for further return to plaintiff's petition, respondents allege and aver that plaintiff is endeavoring to secure and acquire the title and possession of said lots, blocks and parcels of land for speculative purposes, and never has occupied, or intended to occupy, possess, enjoy and improve said parcels of land mentioned in the petition herein as town lots, and that petitioner herein is a pretended and fictitious organization or corporation composed of persons or individuals not inhabitants of the town of Aspen, nor residing therein, or owning or occupying any lot or lots in said town."

The cause was heard by the court, without a jury, upon the petition and answer, and on the following agreed statement of facts:

"That on the 23d day of March, 1880, David Smith, the then county judge of Gunnison county, in which county the land was, made application to the land office to enter the town site of Aspen, in trust for the occupants thereof. A protest was filed against said entry for the reason that the land was mineral land and not subject to entry as a town site. A hearing was had, and on October 22, 1880, the register and receiver decided that the application and entry should be allowed. April 11, 1881, the decision was affirmed, and on the 2d of June, 1881, the entry of the land was allowed to be made. Pending these proceedings, by an act of the legislature, the county of Pitkin was created out of a portion of Gunnison county, which includes the town site of Aspen, and J. W. Deane was appointed and qualified as county judge of the new county, and the town of Aspen became incorporated. J. W. Deane, as such county judge, on the 2d day of June, A. D. 1881, made the entry of the town site as

theretofore applied for, in trust for the inhabitants of the town, and received a certificate of entry therefor. On the 9th of June, 1881, the town authorities protested this entry, and prayed the commissioner of the land office to cancel the same and allow the town authorities to make the entry of said town site. On the 19th of July, 1881, the commissioner made an order suspending the entry until further proceedings on said protest were determined. On the 5th of May, 1884, the commissioner held said entry for cancellation. On the 18th of July, A. D. 1884, the honorable secretary of the interior decided that, by the incorporation of the town of Aspen before the entry was made, the town authorities were the successors in trust of the town site, and modified the order of the commissioner holding the entry for cancellation, and ordered a patent to issue on the entry to the town authorities. Afterwards, on the 3d of March, A. D. 1885, a patent was issued on the entry made by J. W. Deane, as county and probate judge, reciting, among other things, the decision and order of the secretary of the interior, which reads as follows: 'Now know ye, the United States of America, in consideration,' etc., 'have given and granted, and by these presents do give and grant, unto the said J. W. Deane, county and probate judge aforesaid, and to his successors and assigns, in trust as aforesaid, the said tract above described [describing the Aspen town site], to have and to hold the same, together with all rights, * * * unto the said J. W. Deane, county and probate judge as aforesaid, and to his successors and assigns as aforesaid.'"

Immediately after making the entry of June 2, A. D. 1881, J. W. Deane, as trustee, published notice of such entry, as required by section 3 of the state statute, and the petitioner, the Aspen Town & Land Company, on the 9th day of July, A. D. 1881, signed a statement of its claim to the lots mentioned in the complaint, and delivered it into the office of the county judge, as required by

section 4 of the state statute. That soon after the order of the honorable secretary of the interior of the 18th of July, 1884, the town of Aspen, by reason of becoming incorporated at the time aforesaid, published a notice under the state statute, and the intervenor* not having made any filing under the notice published by J. W. Deane as county judge, or within ninety days thereafter, of her claim to the lots described in her petition in intervention, filed a statement with the corporate authorities in pursuance of the notice published by them. At the expiration of the ninety days from the first publication made by J. W. Deane, as trustee as aforesaid, the defendant, the Aspen Town & Land Company, demanded a statement of the expenses and costs due upon the lots theretofore filed upon by it, and tendered to the then acting trustee the amount so due, and demanded deeds for said lots; and, before the commencement of the action by it against the corporate authorities, further demanded said deeds to be executed to them, by the corporate authorities, which demand was refused. That the only statements filed by the defendant company were those filed on the 9th day of July, A. D. 1881, in the office of J. W. Deane, the then acting trustee. That the Aspen Town & Land Company was a corporation, duly organized and existing under the laws of the state of Colorado, and has been such corporation at all of the times mentioned in the complaint filed herein. That the Aspen Town & Land Company was the only person, company or association of persons which filed on the lots described in the complaint herein, in the office of J. W. Deane, as county and probate judge, and that no filings were tendered by any one else covering said lots or parcels of ground or any part thereof. That on, to wit, the 3d day of March, A. D. 1885, and in pursuance of the entry made by J. W. Deane, as county and probate judge as aforesaid, a patent was issued for the said town site of Aspen, which said patent, excepting the description by metes and bounds, is as follows, to wit:

* NOTE.— There was no intervenor in this case.

'The United States of America to All Whom These Presents Come, Greeting: Whereas, on the 23d day of March, 1880, an application was made to the register of the United States land office at Leadville, Colorado, by the citizens of the town of Aspen, in the county of Gunnison and state of Colorado, to enter the lands hereinafter described, as the town site of Aspen, under the act of congress, approved March 2, 1867, entitled 'An act for the relief of the inhabitants of cities and towns upon public lands,' accompanied by a plat of survey of said town site, executed by B. Clark Wheeler, United States deputy-surveyor, and tender of payment by a deposit of the purchase price of the land with the receiver of said land office; and whereas, by the act of the legislature of Colorado, approved February 23, 1881, the county of Pitkin, embracing a portion of said county of Gunnison, including said town site of Aspen, was created out of said county of Gunnison; and, whereas, it appearing that the town of Aspen had been duly incorporated under the laws of Colorado, and therefore that the corporate authorities of said town are the legal successors of the town-site trust applied for and hereinbefore set forth as found by the decision of the Hon. Henry M. Teller, secretary of the interior, dated July 18, A. D. 1884; and whereas, J. W. Deane, county and probate judge of said Pitkin county, made town site cash entry under date of June 2, A. D. 1881, for the land theretofore applied for, in trust for the inhabitants of said town of Aspen, as appears by the certificate of said receiver of said land office, numbered 647, and bearing the said date of June 2, 1881; and whereas, the honorable secretary of the interior, by his decision aforesaid, has directed that a patent be issued in the name of the corporate authorities of said town of Aspen, upon the entry made by the said J. W. Deane, county and probate judge of said county of Pitkin, in trust as aforesaid, for the following described tract of unsurveyed land, to wit [here follow field-notes]: Now, know ye, that the United States of America, in consid-

eration of the premises, and in conformity with the general acts of congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said J. W. Deane, county and probate judge as aforesaid, and to his successors and assigns in trust, as aforesaid, the said tract above described, to have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatever nature thereunto belonging, and the said J. W. Deane, county and probate judge as aforesaid, in trust as aforesaid, and to his successors and assigns in trust as aforesaid: provided, that no title shall be hereby conveyed of any mine of gold, cinnabar or copper, or to any valid mining claim or possession held under existing laws; and provided, further, that the grant hereby made is held and declared to be subject to all conditions, limitations and restrictions contained in section 2386 of the Revised Statutes of the United States, so far as the same are applicable thereto.

‘In testimony whereof, I, Chester A. Arthur, president of the United States of America, have caused these letters to be made patent, and the seal of the general land office to be hereunto affixed.

‘Given under my hand at the city of Washington, the 3d day of March, 1885, and of the independence of the United States the one hundred and ninth.

‘By the President: CHESTER A. ARTHUR. [SEAL.]

‘By M. McKEAN, Secretary.

‘S. W. CLARK, Recorder of the General Land Office.’”

The court below upon the issues and facts decided the petitioner to be entitled to all the lots and lands claimed by it and described in its petition, and gave judgment that peremptory writ of *mandamus* issue to the corporate authorities of said town, commanding them to immediately issue deeds to the petitioner therefor.

The errors relied on are as follows: *First*. That the court erred in awarding a peremptory writ of *mandamus*

against defendants and respondents. *Second.* The court erred in deciding that petitioner was entitled to the property claimed by it in its petition. *Third.* The court erred in entertaining the application for a peremptory writ of *mandamus*, because the remedy of petitioner, if any, is by proceedings in a court of equity. *Fourth.* That the court erred in deciding that the petitioner was entitled to any lots, or parts of lots, in the town site of Aspen, because it appears that the petitioner was not a *bona fide* occupant of the same, or any of them.

Messrs. A. HEIMS, L. S. DIXON and C. J. HUGHES, for appellant.

Messrs. TAYLOR and ASHTON and J. M. DOWNING, for appellee.

BECK, C. J. It is assigned for error that the court erred in entertaining the application for a temporary writ of *mandamus*, because the remedy of petitioner, if any, was by a proceeding in equity. In support of the remedy selected by the plaintiff, we are referred to section 333, page 102, of the Civil Code, which provides that "the writ of *mandamus* may be issued * * * to any inferior tribunal, corporation, board, officer, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station." Also to the following quotation from High, Extr. Rem. § 80 (and to many other authorities of similar import), viz.: "Whenever a specific duty is required by law of a particular officer, unattended with the exercise of any degree of official judgment or element of discretion, and on the performance of which individual rights depend, *mandamus* is the appropriate remedy for the failure or refusal to perform the duty." Another statement of the rule, not inconsistent with the foregoing, but more pertinent to this case and supported by authorities cited, was laid down by this court in *People v. Spru-*

ance, 8 Colo. 319, as follows: "The writ of *mandamus* is said to be a high prerogative writ, which should never issue unless the party applying for it shall show a clear legal right to have the thing sought by it done in the manner and by the person sought to be coerced. It must not only be in the power of such person, but it must be his duty to perform the act sought to be done."

1. Leaving out of view, for the present, the validity of the plaintiff's claim, did the law cast any duty upon the corporate authorities of the town of Aspen, or were they invested with power to convey to claimants title to the lots, blocks and parcels of land comprising said town site? If not, the remedy by *mandamus* is not available, and it is immaterial whether a remedy in equity existed or not.

It would certainly appear, from the facts and circumstances attending the entry of this town site, and the issue of the patent therefor, as the same are set forth in the agreed statement of facts, and appear in the patent itself, that the patent might have issued direct to the corporate authorities, instead of the county judge. Such would seem to have been the view and direction of the honorable secretary of the interior at the time the entry was held for cancellation. Whether his order was misinterpreted, or whether by inadvertence the patent was issued to the county judge instead of the corporate authorities, we have no means of ascertaining, but the title to the town site was clearly conveyed to J. W. Deane, in his official capacity as county judge, in trust, as required by the acts of congress. The conveyance was likewise pursuant to the entry made by him in the United States land office, which is stated in the patent to have been made "*in trust for the inhabitants of said town of Aspen.*" The granting clause of the patent is in the usual form, conveying the title to said county judge, "*and to his successors and assigns, in trust.*" This language has always been held, so far as we are advised, to

be equivalent to a grant to the officer named, in his official capacity, and to his successors in office, in trust for the use and benefit of the *cestui que trust*. The title of the property in question never having vested in the corporate authorities of said town, it follows that it was not in their power, and consequently not their duty, to execute the deed demanded by the plaintiff and required by the judgment of the court below. If this proposition be correct, the district court was without jurisdiction to award the peremptory writ.

The patent must be construed according to the acts of congress authorizing its issuance; and while the recitals therein set forth may indicate the views of the government officers respecting the rights of parties, the form and manner of executing the patent must be in conformity to the laws of congress. *McGarrahan v. Mining Co.* 96 U. S. 316. The congressional act of March 2, 1867, has, in numerous cases, been held to be substantially similar to the original act of May 23, 1844. It differs as to who may be trustee of a town site in this: that it permits the corporate authorities of an incorporated town to enter the town site, and, if not incorporated, the judge of the county court, "in trust for the several use and benefit of the occupants thereof," while the former act permitted the entry to be made by the county judge in all cases, but in the same manner and for the same purposes. The forms of the patents under both acts are substantially the same; limiting the trust estate to the officer making the entry (designating him by his official title), "*and to his successors and assigns, in trust.*"

The proper construction of the words "limiting the trust" was considered in *Smith v. Pipe*, 3 Colo. 187, 196. Justice Wells, who delivered the opinion in the case, says: "It cannot be doubted that the purpose of the statute is to confer the estate upon the county judge, or the corporate authorities in their official and politic capacity, and to limit it to the successors in office until the trust

should be finally exhausted." This opinion further holds that the power to take the grant as trustee is vested in the officer, and not in the individual, and that it is unnecessary in the patent to designate the incumbent by his proper name.

The trust in the present case having vested in the county judge, by the issue of the patent to that officer, and the grant being limited therein in the usual manner, "and to his successors and assigns in trust," it follows that the successors mentioned are the successors in office, notwithstanding the previous recitations in the patent, for the act of congress does not authorize any other successors. In holding that the legal title to the town site vested, under the grant, in the county judge and his successors in office, in trust for the occupants thereof, it does not necessarily follow that the trust must continue to be executed by the said successors until the trust estate is extinguished. This grant was made under peculiar circumstances, and possibly the language employed in the granting clause of the patent does not express the will of the grantor on this point. If it should be made to appear, in a proper proceeding, with proper parties thereto, that the officers of the government, having jurisdiction to decide what local official or officials should be clothed with power to execute this trust, intended by their official action herein that the corporate authorities of the town of Aspen should execute the trust, that intent may still be rendered and made effective as to the unexecuted portion of the trust. *Silver v. Ladd*, 7 Wall. 219; *Johnson v. Tousley*, 13 Wall. 72.

The patent cannot be collaterally attacked, and its validity must be assumed in the present action. For the purposes of this case, it must be treated as issued to the proper party, and its legal effect determined accordingly. Since the county judge is the patentee, and, as above shown, the statute, as construed by this court, names his successors in office as the successors in trust, the patent

cannot be regarded in this case as changing the latter succession to the town authorities.

2. The remaining errors assigned question the right of the plaintiff to a conveyance of any portion of the large body of lots and blocks claimed by it. The plaintiff's petition contains no allegation that the right of the plaintiff to a conveyance of any portion of these lands has ever been adjudged in its favor. The contrary inference may be drawn from the averments of the petition, that the statement of the plaintiff's claim was made to County Judge Deane, and, although often requested, neither he nor his successors in office, King and Rucker, have ever conveyed to plaintiff the said lots, blocks, pieces and parcels of land, or any part thereof. It is not averred in the petition that any statement of the plaintiff's claim was presented to the corporate authorities for adjudication. There is no averment in the petition, nor any mention or admission in the agreed statement of facts on which the case was tried, that the plaintiff was in any manner an occupant of any portion of the lands so claimed; nor is there any statement therein that the plaintiff is, or ever has been, a resident of said town of Aspen. On the contrary, it is affirmatively alleged in the answer of the respondents that the plaintiff never has occupied any portion of the lands claimed in the petition; that the plaintiff corporation is composed of persons not inhabitants of said town of Aspen, nor residing therein, nor owning or occupying any lot or lots in said town, and that it is endeavoring to acquire the title and possession of said lots for speculative purposes. These averments are neither traversed by a reply nor refuted by proof.

The pleadings and the proofs, on this point, therefore, present the same question passed upon at the present term in the case of *Town of Aspen v. Rucker*, ante, p. 184. It was there adjudged, upon the admissions of the pleadings to that effect, that the Aspen Town & Land Com-

pany never was an occupant or in possession of any portion of the town site of Aspen; that it was not a beneficiary of the trust, and acquired no right to a conveyance by its statement of claim and demand for conveyance. The decisions of the courts upon this point are clear and decisive that no claimant of lots comprising a portion of a town site is a beneficiary of the trust, or entitled to a conveyance, without proof of actual occupation, either by the claimant or his grantors, whether such claimant be an individual or a town company. *Cook v. Rice*, 2 Colo. 131-136; *Clayton v. Spencer*, 2 Colo. 378-380; *Town Co. v. Maris*, 11 Kan. 128; *Sherry v. Sampson*, 11 Kan. 611, 615; *Clark v. Titus*, 11 Pac. Rep. 312, 314.

It was held in *Hussey v. Smith*, 99 U. S. 20, that an occupant has the power to sell or convey his possessory right, and that the purchaser from him may acquire such right to the occupancy as to entitle him to a judgment for a conveyance; but it is not contended that the plaintiff in this case holds any such claim or conveyance. But the plaintiff bases its right to a conveyance of the real estate described in its petition (the same exceeding one hundred blocks and parts of blocks of said town site) upon a compliance with the provisions of the state statute of March 1, 1881 (Laws of 1881, p. 237). In its own language, the statement of the claim was: "That the specified right, interest and estate which * * * petitioner claimed in the parts and parcels of land described in the statement in writing, and hereinafter particularly set forth and described, was the right to occupy and possess such parcels, parts and tracts of land, and to be entitled to receive a deed from such county judge, conveying to it the legal title to such parcels or parts of land, and the right to and to be the owner of the title in fee thereto." It also relies upon the admitted fact that it "was the only person, company or association of persons which filed on the lots described in the complaint herein, in the office of

J. W. Deane, as county and probate judge, and that no filings were tendered by any one else covering said lots or parcels of ground.”

Section 4 of the state statute requires that “each and every person or association or company of persons claiming to be an occupant or occupants, or to have possession, or to be entitled to the occupancy or possession, of such lands, or to any lot, block, share or parcel thereof, shall, within ninety days after the first publication of such notice, in person, or by his, her or their duly authorized agent or attorney, sign a statement in writing containing an accurate description of the particular parcel or parts of land in which he, she or they claim to have an interest, and the specific right, interest or estate therein which he, she or they claim to be entitled to receive, and deliver the same into the office of such corporate authorities or judge; and all persons failing to deliver such statement within the time specified in this section shall be forever barred the right of claiming or recovering such lands, or any interest or estate therein, or in any part, parcel or share thereof, in any court of law or equity.” Section 1 makes it the duty of the corporate authorities or judge who shall make the entry to dispose of and convey the title to such land, or to the several blocks, lots, parcels or shares thereof, to the persons described in the act, and in the manner specified therein. Section 2 requires the trustee, by a good and sufficient deed of conveyance, to “grant and convey the title to each and every block, lot, share or parcel of the same to the person or persons who shall have, possess or be entitled to the possession or occupancy thereof according to his, her or their several or respective rights or interest in the same, as they existed in law or equity at the time of the entry of such lands, or to his, her or their heirs or assigns.” There are other provisions, as in section 27, requiring deeds to be executed to claimants, but all are limited to *person, association and company of persons entitled to the lots and blocks.*

Now, what interest in the numerous lots and blocks of this town site so claimed by it has the plaintiff disclosed? By virtue of what acts done by it does it become *entitled* to deed in fee-simple? It specifies no act save the filing of its claim within the *ninety days*, couched in the phraseology of the statute, and tender of fees and charges. It sets up no claim as heir or assignee of an occupant, does not claim to be or to have been an occupant of any part of the real estate, or even a resident of the town, and, when charged by the respondent with an attempt to acquire the title to this body of lots and blocks for speculative purposes, fails to even deny the charge.

We do not think the act of the legislature will bear the interpretation placed on it by the petitioner and its counsel. Although not framed as perspicuously as it might have been, it does not seem capable of the construction sought to be placed upon it. But if it did, it would be in plain violation of the intent and purposes of the act of congress, which has frequently been construed to include, as beneficiaries of the trust, occupants of the town site only.

In *Lecher v. Chapin*, 12 Nev. 71, the court remark, in discussing this point: "In the consideration of this question we must not lose sight of the fact that the act of congress was intended for the benefit and protection of the actual citizens of the town against those making claim to the land for purely speculative purposes;" citing *In re Selby*, 6 Mich. 193; *Town Co. v. Maris*, 11 Kan. 128; *Jones v. City of Petaluma*, 38 Cal. 397.

In *Town Co. v. Maris*, *supra*, the court, in discussing the claim of a town company, announced the following doctrine, which is quoted with approval in *Lecher v. Chapin*, *supra*, and in *Clark v. Titus*, 11 Pac. Rep. 312: "The legislature, in prescribing rules for the execution of the trust, cannot change it by substituting other parties to receive its benefits than those indicated by the law of congress. If individuals or town companies

choose to lay out lands for a town site, and make money by the means, there is no law to prevent it; but they cannot pre-empt the public domain for that purpose under the law of congress. The law was made for the benefit of the occupants of the town, and not for speculators." See, also, *Carson v. Smith*, 12 Minn. 560 (Gil. 458); *Hussey v. Smith*, 1 Utah, 129; *Treadway v. Wilder*, 8 Nev. 98, 99; *Phillpotts v. Blasdel*, id. 67.

We are of opinion that the court erred in entertaining the application for the peremptory writ of *mandamus*, and in awarding said writ, for the reasons above given. The judgment is reversed and the cause remanded, with directions to dismiss the proceeding.

Reversed.

ELBERT, J. (*dissenting*). I concur in the conclusion that the judgment of the court below must be reversed, but dissent from some of the views expressed in the majority opinion. My opinion in brief is this: If the patent we are considering is to be given any effect, the title to the town site in question (the term of office of the probate judge having expired) is in the corporate authorities of the town, who are designated in the patent as successors in trust. I rely on the terms of the grant. These terms must be construed in connection with the recitals contained in the patent. The grant is to "the said J. W. Deane, county and probate judge as aforesaid, and to his successors and assigns in trust *as aforesaid*." The "successors aforesaid" are the corporate authorities expressly mentioned in the recitals of the patent as the legal successors of the trust. It is not correct to say, as is said in the majority opinion, that "the granting clause of the patent is in the usual form conveying the title to the county judge and his successors and assigns in trust." On the other hand, the grant is to the county judge and "his successors and assigns in trust *as aforesaid*." The decisions cited in this connection by the majority opinion

are undoubtedly correct, but it will be seen by what we have said, and more fully by a careful perusal of the patent, that the patent before us presents an entirely different and distinct question from any raised in those cases. I submit that the terms of the patent support the view I have stated, and I know of no authority in conflict with it. Undoubtedly, where, under the law, the patent *properly* issues to the probate judge, the officers of the government cannot, as is claimed in the majority opinion, designate successors in trust other than those contemplated by the law; but in this case the patent did not properly issue under the law to the probate judge. The town was incorporated, and the patent should have issued to the corporate authorities. In saying this I assume nothing, nor do I attack the patent. I take it with its terms and the facts as they appear in its recitals, and construe it *ex visceribus suis*. The foregoing objection, therefore, made in the majority opinion, with respect to the power of the ministerial officers of the government, goes to the *trustee* designated, rather than to the *successors* designated. As it appears from the patent that the grant under the law should have been direct to the corporate authorities in the first instance, I see no legal difficulty in saying that they could take as successors in trust. This is the one respect in which the patent may, without violence, be sustained under the law as being an attempt to comply with the requirements of the law. Act Cong. March 2, 1867. I see no propriety in accepting the terms of the patent only in so far as they *misdirect* the title, and in rejecting them in so far as they vest the title again in the only proper trustees recognized by the law, under the facts disclosed by the patent. The grant is to "the said J. W. Deane, county and probate judge as aforesaid, and to his successors and assigns in trust as aforesaid." I interpret this clause, "that the matter may be of validity sooner than be lost," and the maxim is *ut res magis valeat quam pereat*. Broom, Leg.

Max. 541. I am of the opinion, therefore, that, upon the expiration of the term of office of the probate judge (if not before), the title passed to the corporate authorities as the successors in trust named in the grant. This construction places the title where it should be, both by the terms of the grant and the law governing the grant. In this view no legal proceeding is necessary upon the part of the corporate authorities to perfect their title.

This view involves a dissent upon another point. The town of Aspen being an incorporated town, the patent, under the laws of congress, could lawfully issue to the corporate authorities only, and they alone could exercise the trust. The patent having improperly issued to the probate judge, if it passed the title, it does not follow that he could discharge the trust. He is in the position of one who has a trust estate thrust upon him, in a case where the law designates other and different trustees. While we may treat him as holding the title to the trust estate, we cannot treat him as clothed with the powers conferred by the law upon the proper trustees.

REDUS V. THE PEOPLE.

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1. An indictment charging that defendant unlawfully, feloniously, wilfully, purposely, and of his malice aforethought, did kill and murder the deceased, is sufficient to warrant a verdict finding that the homicide was committed with deliberation and premeditation — a finding necessary to authorize the death penalty.
2. When one is tried as on a charge of murder in the first degree, but the jury find a verdict of murder in the second degree, the error is not cured if the indictment fails to describe the higher grade of the crime.
3. An instruction charging the jury that testimony admitted, tending to show that deceased, when intoxicated, was a quarrelsome and dangerous man, was not material in determining the intent with which defendant acted, unless at the time of the homicide he had knowledge of deceased's character in this respect, is not error.

Error to District Court, Montrose County

REDUS was tried in the court below upon an indictment charging murder. He was convicted of murder in the second degree, and sentenced to fourteen years in the penitentiary. To reverse this judgment the present writ of error was sued out.

The statutes of 1870 and 1883, referred to in the opinion, read as follows (act of 1870):

“Section 1. That section 20 of said chapter 22 of the Revised Statutes of Colorado territory shall be hereafter construed so that the death penalty for the crime of murder shall not be ordered to be inflicted by the courts of the territory unless the jury trying the case shall, in their verdict of guilty, also indicate that the killing was deliberate or premeditated, or was done in the perpetration or attempt to perpetrate some felony.

“Section 2. Any person hereafter found guilty of the crime of murder by the verdict of a jury, without any indication in such verdict whether the killing was deliberate or premeditated, or was done in the perpetration or attempt to perpetrate some felony, shall be sentenced to confinement in the penitentiary for and during such person's natural life, which confinement may be with or without hard labor, or both, at the discretion of the court.”

“Gen. St. 1883, § 709. * * * All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any kind of wilful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem or burglary, or perpetrated from a deliberate and premeditated design, unlawfully and maliciously to effect the death of any human being other than him who is killed, or perpetrated by any act greatly dangerous to the lives of others, and indicating a depraved mind regardless of human life, shall be deemed murder

of the first degree, and all other kinds of murder shall be deemed murder of the second degree. The jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder in the first or second degree. Every person convicted of murder of the first degree shall suffer death, and every person convicted of murder of the second degree shall suffer imprisonment in the penitentiary for a term not less than ten years, and which may extend to life. If any person indicted for murder shall plead guilty to the indictment, the court shall thereupon impanel a jury, as in other cases, to whom shall be submitted, as the sole issue in the case, the question whether the killing was murder in the first or second degree. The jury in every such case shall find the degree thereof, and the court shall thereupon give sentence accordingly."

All other matters material to the decision are sufficiently stated in the opinion.

Messrs. STIRMAN and CARPENTER, for plaintiff in error.

ALVIN MARSH, Attorney-General, for defendant in error.

HELM, J. The indictment in this case charges that defendant unlawfully, feloniously, wilfully, purposely, and of his malice aforethought, did kill and murder the deceased. Under this indictment defendant was tried upon the theory that he might be convicted of murder in the first degree. Such proceeding, his counsel assert, was a fatal error. They claim that the words used are wholly insufficient to warrant the jury in finding that the killing was done with *deliberation* and *premeditation*,—a finding necessary in this case to such a conviction as would authorize the death penalty. They contend that, to sustain such a finding, the indictment itself must, under section 709 of the General Statutes, adopted in 1883, aver that the killing was done with deliberation and premedi-

tation, using these or equivellant words; and that, failing so to do, its averments are not broad enough to charge the offense for which defendant was put upon trial.

It cannot be said that, since defendant was only convicted of murder in the second degree, he could not have been prejudiced through the error committed by putting him upon trial for his life, if error there was in so doing.

Under statutes substantially similar to the one upon which counsel rely, two views relating to the subject in hand have been taken. Mr. Bishop, in a lengthy and able argument, affirms the proposition above stated and urged upon us. Supporting him are the decisions of courts of last resort in Iowa, Ohio and Kansas, together with strong dissenting opinions in Wisconsin and other states. 2 Bish. Crim. Proc. (2d ed.) §§ 562-609, and note. On the other hand, Mr. Wharton declares that, "according to the great weight of authority, a common-law indictment for murder is sufficient to support, under the statutes, murder in either first or second degree." 2 Whart. Crim. Law, § 1115, and cases cited. It is scarcely necessary to state that common-law indictments do not, as a rule, use the words "deliberation and premeditation," and that the indictment before us sufficiently charges the offense at common law.

We deem it unnecessary to discuss at length the relative merits of the two positions thus taken in this legal controversy, because —

First, they relate to what is hardly, in this state, an open question. In the year 1870 an amendment to the Criminal Code was adopted, the first and second sections of which provided that when, upon a trial for murder, the jury convicted, and stated in their verdict that the killing was deliberate or premeditated, or was done in the perpetration or attempt to perpetrate some felony, the punishment should be death; but if the jury returned a verdict of guilty, without declaring that the killing was deliberate or premeditated, or was done in the perpetra-

tion or attempt to perpetrate some felony, the penalty to be imposed by the court was imprisonment for life. Sess. Laws 1870, p. 70; Gen. Laws 1877, §§ 868, 869. So far as the question now presented is concerned, there is no difference in principle between the act of 1870 and that of 1883, which more closely resembles in form the "parent statute" of 1749 in Pennsylvania. Both acts distinguish between grades of punishment, but the latter uses, with reference to such distinction, the terms "first degree" and "second degree," not found in the former. It also ameliorates the penalty provided by the former, where the conviction is of murder in the second degree, by giving the court discretionary power to impose a sentence ranging downward from imprisonment for life to ten years in the penitentiary. The remaining changes effected by the act of 1883, including the substitution of the conjunction "and" for the conjunction "or" between the words "deliberate" and "premeditated," are of no significance in the present inquiry. If an indictment, in a case like the one at bar, framed under the act of 1870, which did not charge that the offense was committed with deliberation or premeditation, was sufficient to put the accused upon trial for his life, such an indictment is most certainly sufficient, under the present statute, to sustain a conviction of murder in the first degree.

In *Hill v. People*, 1 Colo. 436, the identical question now presented was submitted and passed upon by the court under the act of 1870. The indictment in that case, like the indictment in this, failed to aver that the killing was done with deliberation or premeditation; yet the court held it sufficient, although the accused was found guilty of premeditated murder, and sentenced to death. The learned judge who wrote the opinion rested his argument mainly upon the proposition that the expression "malice aforethought" is co-extensive in meaning with the words "deliberation" and "premeditation." He says, in discussing this expression, that its primary and popu-

lar significance is "rather more comprehensive than 'deliberation' and 'premeditation,' inasmuch as the latter words do not necessarily imply wickedness of purpose or evil design. Said Lord Coke (3 Inst. 51): 'Malice prepensed is when one compasseth to kill, wound or beat another, and doth it *sedato animo*. This is said in law to be malice aforethought, prepensed, *malitia precogitata*.' The [technical legal] meaning of these words has been greatly *amplified* since the days of Lord Coke. * * * Before the statute of 1870 it was never doubted that a formed design and deliberate purpose to kill was provable under the averment of malice aforethought, and there is nothing in the statute to change the rule on this subject." But, as we have already intimated, if there is nothing in the statute of 1870 "to change the rule on this subject," the rule remains unchanged under the statute of 1883.

No doctrine of the criminal law is more axiomatic than that the indictment must fully and fairly charge the offense for which the accused is put upon trial; and, if the language of the Redus indictment does not comply with this essential requirement, no reasoning, however ingenious, will avoid the force of Mr. Bishop's argument, or the application of his conclusion. But we believe that the language of this indictment is sufficient. The expression "feloniously, wilfully, and of his malice aforethought, did kill and murder," states the *quo animo* of the slayer, as well as the fact of the homicide. It charges, not only the specific intent of the slayer to take life, but also (accepting Lord Coke's definition, above given) that the intent, together with the malevolence, was pre-pense,—aforethought. This malevolent design to kill may have been formed at the instant of the homicide, or it may have existed in the mind of the slayer for a considerable period before it was put into execution.

Secondly. Neither of the acts under consideration creates or recognizes a *new* offense. They both assume that

the offense already exists, and merely provide different grades of punishment, according to the circumstances or the condition of mind under which the crime is committed. The crime, as defined and understood at common law, has always existed in Colorado. The territorial legislature of 1861 expressly affirmed its existence by adopting a statute, in which there has since been no substantial alteration, giving the common-law definition. Gen. St. § 707. Moreover, the legislature, in 1879, as if to anticipate the very question we are now discussing and put it at rest, enacted a section which contains the following declaration: "It shall be sufficient, in every indictment for murder, to charge that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased." Gen. St. § 926. In view of the conclusion above expressed, viz., that the phrase "feloniously, wilfully, and of his malice aforethought," fairly includes the idea of deliberation and premeditation, this provision cannot be assailed upon constitutional grounds. It is still in force, and we must hold that an indictment containing the language used therein by the legislature will sustain, upon proper evidence, a conviction of murder in the first degree.

Passing from the indictment, a further objection is urged. It relates to the sixth instruction given by the court below. This part of the charge informed the jury that the testimony admitted, tending to show that deceased, when intoxicated, was a quarrelsome and dangerous man, was not material in determining the intent with which defendant acted, unless it appeared that he had, at the time of the homicide, knowledge of the deceased's character in this respect. It is contended that evidence of this kind is admissible, and is to be considered by the jury, even if the defendant possessed no such information or knowledge. We shall enter into no lengthy discussion of this subject. There are isolated expressions, both in decisions and text-books, which

seem, at first glance, to warrant the position of counsel. Upon careful examination, however, it is found that such evidence is only admissible — *First*, when the accused is attacked, and claims to have been acting in self-defense; and, *secondly*, when his *belief* of actual danger at the time of the homicide is the specific point of inquiry. But it is submitted that, without some knowledge thereof, deceased's general character as a quarrelsome and dangerous man could not affect defendant's belief as to his own impending danger.

The true doctrine is thus stated by Mr. Wharton: "Suppose the defendant should simply ask to prove that the deceased was ferocious and desperate as a ground of justification, the answer would be: 'No man has a right to take the law in his own hands, and act as a sort of vigilance committee to clear society of dangerous persons.' But, on the other hand, suppose the offer to be, not justification, but excuse on the ground of self-defense, or mitigation of the grade of guilt. If, in such case, it be proved that the defendant was actually attacked, and if evidence should be then tendered that the deceased was a man of ferocious temper or malignant passions, and of overpowering strength, *and if it be, in addition, offered to be proved that the defendant had notice of these characteristics of the deceased*, then the better opinion is that the evidence is admissible." 1 Whart. Crim. Law (7th ed.), § 641; *State v. Turpin*, 77 N. C. 473; *State v. Graham*, 61 Iowa, 608; *State v. Riddle*, 20 Kan. 711.

Nor does the foregoing view conflict with the position announced by this court in *Davidson v. People*, 4 Colo. 145. By carefully reading the whole opinion, counsel will discover that they have misunderstood its purport. They will see that the prisoner's knowledge of the deceased's quarrelsome and dangerous character is specifically mentioned as an element bearing upon the consideration of evidence relating to such character.

The remaining objection presented is that the verdict

was contrary to the evidence. The record shows a number of circumstances somewhat palliating the offense. Deceased was a powerful man. He was evidently, when in liquor, quarrelsome. He began the affray by using abusive language, and followed it up with blows from the open hand. But he was intoxicated, while defendant was sober. Defendant could have left the room, as he was advised to do, after deceased began his insulting remarks and his assaults, and thus have avoided further trouble. That the jury gave defendant the benefit of the extenuating circumstances is shown by the fact that they not only found him guilty of murder in the second degree, but also, in their verdict, recommended him to the mercy of the court. Upon a careful consideration of the evidence we cannot say that it did not warrant the verdict returned.

The judgment of the court below will be affirmed.

Affirmed.

MORSE AND OTHERS V. CLARK, ADMINISTRATOR.

The statute (Gen. Laws, §§ 2914, 2915, 2918) prescribes the manner of presenting claims against the estates of deceased persons, and provides a summary method of establishing such claims upon notice at any term of the court subsequent to the issuing of letters testamentary or of administration. Plaintiffs filed their claim against the estate of defendant's intestate November 17, 1879, on a cause of action which had accrued January 20, 1877. Prior thereto, on February 4, 1878, plaintiffs had filed the claim, but withdrew it March 30, 1878. *Held*, that the claim was barred by the statute of limitations as not having been filed within two years after the cause of action accrued. The filing and withdrawal of the claim did not constitute the commencement of an action to prevent the statute of limitations from running.

Appeal from District Court, Arapahoe County.

THIS case was tried in the district court upon appeal from the judgment of the county court, allowing the claim on behalf of the appellants and against the estate

of the appellee's intestate. The claim was for contribution in respect to moneys alleged to have been paid by the plaintiffs to discharge a promissory note on which they, the defendant's intestate, and others were alleged to have been sureties. For a second answer defendant averred that the cause of action accrued without the state of Colorado, upon a simple contract, more than two years before the institution of plaintiffs' action. Judgment was given in the district court for the defendant. The plaintiffs appeal to the supreme court.

Statutes referred to:

"Sec. 2914. All persons having claims against the estate may present the same on the day named in such notice, and the court may proceed to hear and determine the same, or, if objection be made thereto by the executor, administrator, or any party interested in the estate, or if cause be shown by the party presenting such claim, may continue the hearing thereof; if no objection be made to any such claim by the administrator, widow, guardian, heirs, or others interested in said estate, the claimant shall be permitted to swear that such claim is just and unpaid, after allowing all just credits; and, if objections be made to such claim, the account shall be adjudicated as is required in other cases; provided, that estate shall be answerable for the costs on the claims filed at or before said term, but not after.

"Sec. 2915. All persons having claims against estates, upon giving the executor or administrator ten days' notice of the time they intend to present the same, with a copy of the account or instrument of writing whereon such claim is founded, may exhibit such claims against the estate at any term of the court subsequent to the issuing of letters testamentary or of administration."

"Sec. 2918. The manner of exhibiting claims against estates shall be by filing in the county court the account or instrument of writing, or an exemplification of the record whereon such claim is founded. Formal plead-

ing shall in no case be required, but the issue shall be formed, heard and determined in the same manner as in actions before justices of the peace."

Mr. M. B. CARPENTER, for appellants.

Messrs. WELLS, MACON and MCNEAL, for appellee.

ELBERT, J. The plaintiffs filed their claim against the estate of the defendant's intestate on the 17th day of November, 1879, having given notice under the provisions of section 2915, General Laws, 972. The defendant, in obedience to the notice, appeared and contested the claim. Hence this suit. The plea of the statute of limitations (R. S. ch. 55, § 16), interposed by the defendant, was good. The cause of action accrued January 20, 1877, the date of the last payment claimed to have been made by the plaintiffs. The filing of the claim, which must be regarded as the commencement of the suit, was not within the two-years limit fixed by the statute. It appears that theretofore, on the 4th day of February, 1878, the plaintiffs had filed the same claim in the probate court, and subsequently, on March 30, 1878, withdrew it. It is claimed that this must be treated as the commencement of the action. However this might be, had the claim not been withdrawn, the proposition is inadmissible in face of that fact. *Reitzell v. Miller*, 25 Ill. 69. The manner of exhibiting such claims against an estate as prescribed in section 131 and elsewhere, in the act of the Revised Statutes referred to, does not constitute the presentation of such claims for allowance, actions or suits at law, in the ordinary sense of these terms, although, when the allowance of such claims is contested, it may ripen into or become the basis of a suit proper. *Corning v. Ryan*, 3 Colo. 528.

It is further contended by counsel for the appellants that the filing of the claim, February 4, 1878, in accordance with the provisions of section 2918, General Laws,

972, stopped the general statute of limitations from running. A like question, under a similar statute, was made in the case of *Reitzell v. Miller*, 25 Ill. 69. The court say: "It was not the design of the general assembly that the filing of a claim should arrest the general statute of limitations which had previously begun to run, nor to prevent it from afterwards running upon a claim not due at the time of its presentation. The object of this section is to facilitate and produce speedy settlement of estates of deceased persons, and it could not have been designed to give creditors an unlimited period of time within which to establish the justice of their claim after they had been exhibited in the probate court. Such a construction would defeat the manifest intention of the enactment." We think this view correct.

The filing of the claim, February 4, 1878, and its subsequent withdrawal on March 30, 1878, and its refileing November 17, 1879, in the county court, are facts which appear from the claimants' own showing. It is therefore unnecessary to go into the question touching the admissibility of the copy of the petition which the defendant offered and the court received in evidence.

The judgment of the court below is affirmed.

HELM, J., did not sit in this case.

Affirmed.

OCTOBER TERM, 1887.

CRAIG V. SMITH ET AL.

1. Where suit is brought against a partnership to collect a firm debt, it is error to render judgment against one of the partners alone as for an individual debt.
2. A plea in abatement must be specific. The proceedings before a justice on such plea must appear in evidence at the retrial on appeal, and be preserved by the bill of exceptions, or they will not be considered by this court.

Appeal from District Court, Conejos County.

THIS suit was brought before a justice of the peace against "P. L. Craig and W. B. Broad, partners using the firm name of Broad & Craig," for a certain demand alleged to be due Smith & Wilson. Service of process was secured only upon Craig, one of the partners. The return of the constable recited the fact that such service was had "by reading the within to the within-named defendant, and by leaving with him, P. L. Craig, of the firm of Broad & Craig, a copy of the same." Judgment was rendered by the justice of the peace for plaintiff for \$188.25, and an appeal taken to the county court. Motion in said court to dismiss; overruled. Change of venue taken by Craig to the district court. Motion to dismiss renewed in the district court, and denied. Trial had, and verdict and judgment against "defendant P. L. Craig" for \$168.25. Appeal by Craig to supreme court. Remaining facts sufficiently stated in the opinion.

Mr. C. C. HOLBROOK, for appellant.

Messrs. WELLS, SMITH and MACON, for appellees.

HELM, J. This action was brought against the firm of Broad & Craig to collect an alleged partnership debt.

10	220
19	209
3a	115
3a	475
10	220
7a	73
10	220
25	237
10	220
15a	97
15a	349
10	220
23	479
10	220
20a	512
10	220
38	183

Judgment was rendered against Craig, the partner served with process, as if for an individual debt.

The evidence is not before us. Whether it established a debt against the firm, a joint liability of Craig and the firm, or simply a personal liability on the part of Craig, it was error to render judgment against Craig alone, because he was not a party to the suit. Freem. Judg. § 141, and cases cited. Craig was served with process solely as a partner, and as a partner he responded and defended. His objection to individual liability through a personal judgment could not have been interposed earlier in the proceedings than it was, because prior to judgment there may have been nothing to apprise him of an intention to hold him for the amount recovered, except as he might be held through a judgment against the firm. The individual property of Craig, as one of the partners, aside from his interest in the partnership property, might, under proper circumstances, be subjected to the payment of a partnership debt; but this fact does not affect his right to have the judgment for a firm debt entered against the firm, and the whole partnership property thus made liable for such debt; nor can it render valid a judgment against one not a party to the record.

For this error the judgment must be reversed. But in view of a retrial in the court below, it becomes necessary to notice two of the remaining questions presented for consideration.

The objection, in the nature of a plea in abatement, relating to the pendency of another suit between the same parties, and involving the same cause of action, cannot be sustained. *First*, because the showing made in support of the motion or plea was insufficient. It does not appear but that the suit begun before Justice Moon had been discontinued by virtue of the statute (sec. 1941, Gen. St.), when the summons in the present action issued from the office of Justice Lewis. *Yentzer v. Thayer, ante*, p. 63. *Second*, because we are not advised that the record

of the proceedings before Justice Moon was offered in evidence, or properly presented at the trial in the district court. And, *third*, if that record was in evidence, it is not preserved in the bill of exceptions, and for this reason could not be here considered.

By taking his appeal from the justice to the county court, asking and securing a change of venue to the district court, and appearing and trying the cause in the latter court on its merits, without objecting to the action of the justice in continuing the hearing before him, Craig waived the right to be now heard as to the alleged erroneous proceeding.

The judgment of the district court is reversed and the cause remanded.

Reversed.

HOWLETT V. TUTTLE.

Where a cause is submitted upon briefs to be filed within a time fixed by the court, and the appellant makes no attempt to comply with the order of submission, the case will be dismissed for want of prosecution.

Appeal from District Court, Arapahoe County.

Messrs. B. M. and C. J. HUGHES, for appellant.

Mr. JOHN W. HORNER, for appellee.

MACON, C. In April, 1884, this cause was submitted on briefs to be filed within a time fixed by the court. The appellant made no attempt to comply with the order of submission until November, 1885, when he tendered for filing the abstract of the record. Afterwards, on January 29, 1886, he filed a motion to vacate the order of submission, and for further time to file arguments. This motion was never raised in this court, and has never

been passed upon. In this state of the case, under the rule enforced in *Railway Co. v. Woy*, 7 Colo. 556, this appeal should be dismissed.

We concur: RISING, C.; STALLCUP, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the appeal from the district court is dismissed, at the costs of the appellant.

Appeal dismissed.

BROPHY V. HYATT.

10	223
20	494
10	223
d34	274

1. Towns incorporated under the statute (Gen. St. p. 958) have power to declare what shall be a nuisance, to abate the same, and to impose fines for creating, continuing or suffering a nuisance to exist; also to regulate, restrain and prohibit the running at large of cattle, etc.
2. Under the amendatory act of 1879 (Gen. St. p. 999), such towns have the power to authorize the impounding and summary sale of cattle, etc., found running at large contrary to ordinance.
3. The object of the requirement of the statute, that upon the passage or adoption of an ordinance or by-law the yeas and nays shall be called and recorded, is to fix the individual responsibility for municipal legislation, of each member voting, by a permanent record. Any mode by which the vote of each member is clearly and definitely ascertained for the purposes of the record is sufficient; a call of the roll is not to be regarded as essential.
4. An ordinance providing for a notice of sale and the payment of the proceeds of the sale of an impounded animal to the owner, after deducting the costs of the proceeding, cannot be considered as declaring or working a forfeiture of the animal, or as in conflict with section 25, article 2, of the constitution.
5. The record of the appointment of a village marshal was read and approved by the board of trustees, as being in accordance with the facts. The validity of his appointment was questioned because the record was interlined. *Held*, that the interlineation was immaterial.

Error to District Court, Conejos County.

THIS is a suit brought by the plaintiff in error against the defendant in error, for trespass, for unlawfully taking, conveying away, detaining and selling a milch cow, the property of the plaintiff in error, to his damage in the sum of \$100. Defendant in error admits the taking, conveying away, detaining and selling the cow, but justifies as marshal of the town of Alamosa, and that he took said cow while running at large in the said town, in violation of an ordinance requiring the taking up, impounding and sale of stock found running at large within the corporate limits of said town. All material allegations of the answer are denied by the replication. Judgment for the defendant and writ of error to the supreme court. Sections of ordinance considered:

“Sec. 16. It is hereby made the duty of the marshal to take up and confine in a secure pen, or place provided for the purpose, every hog, shoat, pig, goat, mule, horse, mare, gelding, stallion, jack, ass, jenny, sheep, ram or goose, or any cow, ox, calf, steer or bull found running at large within the corporate limits of the town; and no such animal taken up and confined as aforesaid shall be released until the owner or owners, or some person for him or them, shall pay to such officer having such animal in charge the sum of \$1, as his fee for taking up, or receiving and discharging, each and every such animal taken up and confined as aforesaid, and the sum of fifty cents for the suitable and proper sustenance of each and every such animal, for every twenty-four hours the same shall be kept.

“Sec. 17. The marshal is hereby authorized and empowered to sell, at public vendue, any animals taken up and confined as aforesaid, five days' notice at least of place and time of sale having been given, by posting at least three notices in the most conspicuous places in said town. But if said animals, or any of them, are re-

deemed, or an offer is made to redeem them by paying the officer's fees, together with the expenses for sustenance, and advertising as aforesaid, at any time before they are actually sold, the same shall not be sold, but shall be released by the officer having the same in keeping. The marshal shall render to the board of trustees, at least once each quarter, a true statement of all fees and money received by him for the animals sold, and the disposition made by him of such money.

"Sec. 18. If any animal shall be sold for more than sufficient to pay the officer's fees and expenses aforesaid, such excess shall be, by the officer making the sale, deposited in the town treasury, to be paid upon the order of the board of trustees to the owner or owners of such animals, upon claim and proper proofs before said board."

Mr. C. C. HOLBROOK, for plaintiff in error.

Messrs. WELLS, SMITH and MACON, for defendant in error.

ELBERT, J. It appears that the town of Alamosa was duly incorporated under the general statute concerning towns and cities. Gen. St. 958. By virtue of section 14, paragraph 45, of this act, the township authorities had power "to declare what shall be a nuisance, and to abate the same, and to impose fines upon parties who may create, continue or suffer a nuisance to exist." And under paragraph 50, power "to regulate, restrain and prohibit the running at large of horses, cattle, swine, sheep, goats, geese and dogs, and to impose a license fee upon dogs." Under the amendatory act of 1879 (Gen. St. 999), they have power "to authorize the impounding and summary sale of horses, cattle, sheep, goats, swine and geese found running at large within such city or town contrary to any ordinance thereof." Under these provisions, the power of the town authorities to pass the ordinance in question appears to have been ample. The

record offered in evidence sufficiently showed the adoption of the ordinance in accordance with the requirements of law.

Section 3324 of the General Statutes provides that, "on the passage or adoption of a by-law or ordinance * * * by any council or board of trustees of the municipal corporation, the yeas and nays shall be called and recorded." In the case of *Tracey v. People*, 6 Colo. 151, this provision was held mandatory, and the case is cited in support of the objection that in the adoption of the ordinance we are considering there was no compliance by the town authorities with this mandatory statute. The object of the requirement that "the yeas and nays should be called and recorded," is to fix the individual responsibility for municipal legislation of each and every member of the council or board of trustees present and voting, by a sure, permanent and public record, showing how he voted upon each and every by-law or ordinance adopted. *Steckert v. City of East Saginaw*, 22 Mich. 109. In the case of *Tracey v. People*, *supra*, the minutes of the meeting of the board at which the ordinance in question was adopted recited only that the several articles of the ordinance were "adopted as read." This was clearly insufficient to show a compliance with the law. In the case at bar, the record of the meeting of the board of trustees recites, respecting the adoption of the ordinance we are considering, that "upon the ballot being spread for its approval and adoption, the votes stood as follows: Ayes, W. R. Neal, C. W. Givens, L. Conley, George H. Shone, D. R. Smith and William Sabine. Noes, none." We think this sufficient. The yeas and nays were ascertained and recorded. This satisfied the essential requirements of the statute. While the usual parliamentary mode of taking such a vote is by a call of the roll, and was doubtless contemplated by the law-maker, still it is not to be regarded as essential. Any mode by which the vote of each member is clearly

and definitely ascertained for the purposes of the record is sufficient.

In respect to the constitutional objections urged by counsel it may be said:

1. The ordinance does not, strictly speaking, declare or work a forfeiture of impounded animals, since it provides for the payment of the proceeds of the sale to the owner, after deducting the costs of the proceeding.

2. Notice of the sale is required to be given, and the owner, if his property has been wrongfully seized, has an ample remedy in an action to recover the property, or its value. Such an ordinance is not in conflict with section 25, article 2, of the constitution, which provides that "no person shall be deprived of life, liberty or property, without due process of law." This has been frequently held with respect to similar ordinances and constitutional provisions. 1 Dill. Mun. Corp. §§ 150, 348, and cases cited; *Gooselink v. Campbell*, 4 Iowa, 296; *Roberts v. Ogle*, 30 Ill. 460; *Hart v. Mayor, etc.* 9 Wend. 589; *Grover v. Huckins*, 26 Mich. 476; *Mayor, etc. v. Lanham*, 67 Ga. 753; *Mayor, etc. v. King*, 7 Lea, 442; *Campau v. Langley*, 39 Mich. 451; *Campbell v. Evans*, 45 N. Y. 356.

The objections taken to the validity of the defendant's appointment as marshal were not well taken. *First.* The election of Johnston, his predecessor, was only for one month, and his term of office having expired, it was competent for the board to elect a successor. *Second.* The record showed his election by ballot, if, as contended, this mode of appointment is contemplated by statute. That the record was interlined was not material, so long as it was read and approved by the board, as being in accordance with the facts. There is some contention that the prescribed notices were not posted for the length of time required by the ordinance, but an examination of the evidence leaves no doubt that the ordinance was complied with in this important particular. The judgment of the court below must be affirmed.

Affirmed.

FILLMORE ET AL. V. WELLS ET AL.

1. In Colorado attorney's fees are not taxable; they are regulated by contract between him and his client.
2. The attorney's statutory lien upon a judgment covers all fees, or balances of fees, due for services previously rendered his client, whether the amount of such fees has been agreed upon or is to be settled in a suit, as upon a *quantum meruit*.
3. Such lien reaches the fruits of a judgment relating to realty as well as the fruits of money judgments.
4. The attorney may waive his right to the benefit of his lien; and, if without notice that he intends to enforce the same, an innocent third person purchases the realty covered by the judgment, or the judgment debtor make a *bona fide* settlement of the judgment, the attorney cannot hold the realty on the one hand, or look to the debtor on the other.
5. A suit may be brought in equity for the enforcement of this lien, and the amount of the attorney's compensation, together with controversies relating to the contract of employment, may be determined in such suit.
6. The attorney's lien attaches under the statute, even though the land recovered by the judgment becomes part of a trust estate belonging to wards, and suit may be brought directly against this part of the trust estate, without first obtaining individual judgments against the guardians.
7. It is not error to receive testimony of plaintiffs to facts occurring subsequent to the decease of the defendants' ancestor.
8. The court exercises a sound discretion, without adhering to any inflexible rule in determining whether there has been a misjoinder of parties in equity.
9. Where an alleged misjoinder appears on the face of the complaint, the defendant, by answering over and going to trial, waives the right to be heard upon the error, if any, in overruling the demurrer.

Appeal from District Court, Arapahoe County.

In the year 1875, Wells & Smith, attorneys at law, instituted a suit in equity in behalf of John Norman and John Septer Fillmore, then minor heirs of John S. Fillmore, deceased, against John J. Reithman, to recover certain premises situated in the city of Denver, and also rents and profits wrongfully collected and withheld. They were employed for this purpose by the guardian of said minor heirs. Various steps were taken in the suit,

10	228
13	426
10	228
18	283
10	228
19	54
10	228
21	380
7a	95
10	228
25	134
25	144
10	228
28	554
10	228
18a	520
10	228
d33	268
10	228
d20a	211
f20a	214

extending through a series of years, but finally terminating successfully. In the year 1880 a decree was entered finding the plaintiffs, the said heirs, entitled to the undivided one-half interest of the premises in controversy, and also to the sum of \$7,998.71 as their share of the rents previously accruing therefrom. The case was taken to the supreme court, both by appeal and error; and the said attorneys, together with Macon (who had some years previously become a member of the firm, and participated in the proceedings), conducted both appellate cases for the heirs. During the spring of 1882 the decree of the lower court was affirmed.

The guardian at the time suit was instituted was Elizabeth M. Kershow. While the suit was pending she resigned said office, and S. Beulow Irwin became her successor. Afterwards the said Irwin resigned, and Levin C. Charles became his successor. Finally the said Charles also resigned, and the defendant Patterson succeeded to the guardianship of the wards. The complaint alleges that the employment of plaintiffs as attorneys by Kershow was duly recognized, and continued by each of the succeeding guardians, including the said Patterson. A small retainer of \$250 was paid to Wells & Smith before the institution of the proceedings above described, but no other fee or compensation of any kind whatever has been received by them, or by Wells, Smith & Macon.

On the 1st day of November, A. D. 1882, plaintiffs instituted this suit in equity, making the said guardian, Patterson, and the said wards, also the said Reithman, parties defendant. They seek to have the amount of their fees or compensation determined, and also to have the same adjudged a lien upon the sum to be paid by Reithman under the decree, and upon the realty recovered as above stated, through their exertions. A reference was had by consent. The proofs were taken and reported, together with findings and a decree awarding plaintiffs Wells & Smith the sum of \$500, and Wells,

Smith & Macon the sum of \$5,500; also recognizing an attorney's lien, under the statute, upon the judgment or decree rendered in the former suit; and providing that the said Reithman pay into court, for the benefit of plaintiffs, the said sum of \$6,000; that, upon his failure so to do, execution should issue, and, if the amount were not made out of his estate, then the premises so recovered as aforesaid by the wards should be sold by the sheriff to pay the same. The findings and decree, after full examination, were duly approved and entered as the findings and decree of the district court. From that decree the present appeal is taken.

A demurrer to the complaint was at the proper stage of the proceedings overruled. The grounds of the demurrer argued in the supreme court were: The misjoinder of parties plaintiff, and the misjoinder of causes of action; also the non-joinder of proper parties defendant, to wit, the three guardians who served as such, and passed out of office prior to the institution of the present suit, and also prior to the conclusion of the former suit in equity.

The law relating to attorney's liens, under which this action was brought, is section 85, General Statutes. It reads as follows: "All attorneys and counselors at law shall have a lien upon any money or property in their hands, or upon any judgment they may have attained [obtained] belonging to any client, for any fee or balance of fees due, or any professional service rendered by them in any court of this state; which said lien may be enforced by the proper civil action."

All remaining facts essential to a correct understanding of the case are sufficiently stated in the opinion.

Mr. H. C. DILLON, for appellants.

Messrs. WELLS, SMITH and MACON, for appellees.

HELM, J. The nature and scope of the attorney's lien at common law have been considered in a large number

of cases. Upon some of the various questions involved in such consideration there is no little contrariety of judicial opinion. But this lien in Colorado is regulated by statute; and several of the matters upon which such diversity of opinion exists are thus effectively put at rest.

Our statute recognizes both the general and special branches of the attorney's lien as it was enforced at the common law; but in some important particulars this lien under the statute is much more complete and satisfactory than it is at the common law. The statutory lien is not limited to costs or to *taxable* fees. It reaches all fees due for services rendered, whether the amount of such fees has been agreed upon, or is to be settled in suit as upon a *quantum meruit*. Nor is it limited to compensation for services rendered by the attorney in procuring the judgment upon which he relies. In this respect it is more comprehensive than the mechanic's lien; it covers a balance legally due him for any and all professional services theretofore rendered his client. While the meaning of the statute in these respects is clear, some other matters connected with the principal subject are not left wholly free from doubt. Counsel for appellant have succeeded in presenting several questions that are both interesting and perplexing. These questions will be briefly considered in their appropriate order.

First. Does the lien given by this statute upon judgments include a decree awarding plaintiff an interest in lands, and thus subject the realty recovered to the payment of the attorney's fee?

There are a few decisions which seem to sustain the attorney's right to look, through his lien, to the land for his taxable fees, in such cases; but the weight of authority undoubtedly sanctions the proposition of counsel for appellant, that no such privilege is awarded by the common law. Whether the discrimination thus made in favor of money judgments is based upon satisfactory

reason or sound principle, we need only consider in so far as it aids us in giving a proper construction of the statute, for we are not now dealing with the common law. This statute recognizes no distinction between judgments for money or personal property, and decrees or judgments by which the ownership or possession of land is awarded to plaintiff, or his interest therein is preserved. It gives the attorney a lien upon "any judgment" obtained by him, and belonging to his client. The language used is clear and comprehensive; it seems to cover all kinds of judgments, regardless of the subject-matter to which they relate. We do not feel at liberty to say that it was the legislative intent to exclude from the operation of the statute all judgments or decrees involving the ownership or preservation of land. Had such been the legislative purpose, different language would have been used in framing the section. This view of the provision is not only consistent with established rules of statutory construction, but, in our judgment, it also comports with an equitable administration of justice in the premises.

The custom of advocates to render their services *quid-dam honorarium* does not exist in this country. We doubt very much if counsel for appellant, who discourse with such evident admiration upon this practice as it existed centuries ago in Rome, in France, and in England, would be willing to see it established in Colorado. The advocate or counselor who should here to day imitate Cicero, and give his services gratuitously, relying solely upon the gift which, in the language of Sir John Davy, "guieeth honor as well to the taker as the guier," would soon find the wolf at his door, unless, like Cicero, he had other sources of revenue. It may, from counsel's standpoint, be a humiliating fact, but it is a fact, nevertheless, that in this respect the legal profession occupies the *status* with us of other employment followed for a livelihood. The attorney is considered worthy of his hire, and

is not in danger of disbarment if he contract in advance for his fees, and collect them by suit, when necessary, after the service is rendered.

The attorney's lien, in so far as it relates to judgments, may be accurately defined as a right conferred by statute, or recognized by the common law, to have his compensation or costs, or both, directly secured by the fruits of the judgment. To declare him entitled to a lien upon the judgment, without permitting him, through such lien, to reach and control the subject-matter of the recovery, would be bestowing upon him the shadow, and withholding the substance. He would be no better off than are other general creditors of his client. What equitable consideration supports the conclusion that he should be secured in this way by the fruits of a money judgment, and yet, as to the fruits of a decree or judgment relating to realty, that he should occupy the attitude of a mere general creditor? The fruits of the latter judgment are often far more valuable to his client than are the fruits of the former. Cases involving the title to or the possession of real estate present questions quite as complicated and difficult, and demand of the attorney quite as much learning and labor, as do those relating to damages for torts, or for the violation of simple contracts.

The strongest objection stated in the decisions to recognizing the attorney's lien, where fees are not taxable, in this class of cases, is based upon the proposition that the lien is secret. It is asserted that, as a consequence of this secret lien, the judgment debtor, or the innocent purchaser of the land in controversy, may suffer wrong through the assertion of the lien after a *bona fide* settlement of the judgment, on one hand, or purchase of the land, on the other. It is even declared in one case that "every tract of land which had once been a subject of litigation would lose most of its exchangeable value from an apprehension of some latent lien in favor of some attorney." *Humphrey v. Browning*, 46 Ill. 476. If, under

our statute, a consequence so grave as the foregoing could follow the recognition of the lien, and if there were room in the language used for construction, we would hesitate long before applying the law in this and similar cases. But, however it may be at common law in Illinois or other states where this view concerning the secret lien and its effect is adopted, the objection has with us no particular force; because, while our statute gives the lien upon the judgment, and, as between attorney and client, nothing need be done prior to its enforcement, as to innocent purchasers of the fruits of the judgment we hold that it may be otherwise.

In *Smelting Co. v. Pless*, 9 Colo. 112, we declared that the judgment debtor is entitled to notice of the attorney's intention to enforce his lien, and that if, without such notice, the debtor make a *bona fide* payment or settlement of the judgment, the attorney cannot look to him. The reasons stated in that opinion with reference to the attitude and liability of the judgment debtor, apply with even greater force to an innocent purchaser for value of the land recovered or preserved by a decree or judgment.

We have no statute regulating attorney's fees and making them a part of the judgment. With us this is solely a matter of contract between attorney and client. The judgment debtor and the innocent purchaser are total strangers to this contract. If no fees are due the attorney, no lien exists. The debtor or purchaser does not necessarily know that the fees were not fully paid or secured in advance, and that the attorney is in position to invoke the statute. Neither are they aware that he will enforce the lien, if he has the right to do so. There is nothing compulsory in this particular; he may or may not, as he chooses, subject the fruits of the judgment to the payment of his fees. While the lien upon the judgment undoubtedly exists if there is a balance due the attorney for services, yet the right to enforce it against the subject-matter of the recovery may, in our opinion, be

waived. It is unfortunate that the statute neither specifies a time for the enforcement of the lien nor a method of giving notice of the purpose to do so. But it is unquestionably true that the legislature never intended the lien to be a perpetual incumbrance upon the fruits of the judgment, regardless alike of the attorney's laches in asserting his intention and the rights of innocent purchasers for value.

We think that if the attorney neglects to proceed to the enforcement of his lien until the debtor has in good faith discharged his liability under the judgment, or a third person has in good faith, and for valuable consideration, purchased the fruits thereof, he should be held to have waived the right to look to the debtor, on one hand, or to such fruits, on the other, for his compensation. That is to say, if, without notice that the attorney intends to enforce his lien, the judgment debtor make a *bona fide* settlement of the judgment, or an innocent third person purchase the property, the statutory right is lost. Of course, any collusive settlement or purchase made for the purpose of depriving the attorney of the benefit of his lien would not be in good faith, and would be of no avail against him.

Again, no objection to recognizing the attorney's lien where his fees are not taxable is thus stated in *Forsythe v. Beveridge*, 52 Ill. 268: "There would be cases in which a very unreasonable portion of the fruits would be demanded by the attorney, and collected under the pressure he could bring to bear upon his client." This objection is declared by the learned court to be of "great weight." Its force is in nowise diminished by the fact that a judgment, as in the case at bar, relates to realty, and not to money damages only. Conduct of the kind mentioned would merit and receive the severest judicial censure, and the guilty party would soon find himself in professional disrepute. But it is sufficient for us to say, with reference to this specific objection — *First*, that, as

already declared, fees to be determined as upon a *quantum meruit* are clearly covered by the statute considered; and, *second*, that such determination takes place in court under rules of evidence and principles of procedure calculated to insure justice between parties litigant:

Second. A second question fairly presented by the record and arguments before us is, Can a *suit in equity* be maintained by the attorney for the enforcement of his lien, when the employment is questioned, and the amount of his compensation is unliquidated?

Counsel contend that since a court of equity is not the proper forum to entertain inquiries into questions of contract, nor the proper tribunal to hear evidence and determine the reasonable value of services rendered, these matters ought to have been adjudicated in a court of law. They say that plaintiffs should have brought their action in a legal forum, and there had all controversy concerning the contract, as well as the amount of compensation, first determined; and that then they might perhaps have instituted proceedings in equity for the enforcement of their lien, if any lien they had.

The distinction between *causes of action* at law and in equity doubtless remains. No attempt has been made to abolish it, and any such attempt would be futile. The code merely abolishes forms of action, substituting, for the numerous common-law forms, but one general method of pleading, whether at law or in equity. And unless a court of equity would, before the code, have been properly clothed with jurisdiction over the cause of action stated in the complaint before us, the action cannot be maintained in equity under the code. *Bank v. Ford*, 7 Colo. 314.

The attorney's lien, whether under the statute or at common law, is equitable in its nature. Even the decisions in this country, which confine its existence and application to the narrowest limits, always speak of it as an equitable lien, right or privilege. It is not property *in*

the thing, which gives a right of action at law. It is a charge *upon* the thing, which is protected in equity. Courts of law may recognize it when the *res* is in possession of the lienor, and the owner is seeking to deprive him of such possession. But where the thing is not in possession, and some affirmative action is required by the attorney, he, like other lien claimants, must seek relief in equity. In some instances, a formal suit should be instituted; in others, an application to the court rendering the judgment, for the proper order, would be sufficient.

The main purpose of plaintiffs in this case is to utilize their lien by subjecting, through it, the rents and real estate, if need be, recovered by their exertions, to the payment of their claim for services. Since the employment by the different guardians, and the amount of compensation, are controverted matters, it becomes incidentally necessary to investigate and determine these questions. If plaintiffs intruded themselves into the cases without employment, and their voluntary services were objected to and repudiated, or if they have been paid all those services are reasonably worth, the statute gives them no lien. But, since a court of equity is the only forum that can enforce by proper decree the lien rights, we are of opinion that this is one of the cases wherein such court may take and retain jurisdiction for all purposes. Having assumed jurisdiction to enforce the lien, it would be encouraging a multiplicity of suits, and, in this as in other respects, contrary to established procedure in equity, to say that the court of equity shall not determine the incidental, though material, legal questions involved. Appellants waived the right, if any such right they had, to have a jury summoned to try any of the questions of fact presented, by consenting in open court to the trial by a referee of "all the issues of law and of fact." We do not say that plaintiffs could *not* have proceeded otherwise; but we are of the opinion that, under

the circumstances, the suit is "a proper civil action," within the meaning of the statute.

Third. It is asserted that, under the contract of employment, plaintiffs are bound to look to the several guardians alone for their compensation; that while, perhaps, the guardians may secure reimbursement from the wards' estate, yet neither the wards nor their estate can by plaintiffs be directly proceeded against and held liable. It is obvious that this objection, if well taken, is decisive against plaintiffs' right of action in the present suit; for if plaintiffs can neither look to the wards nor their estate for the compensation demanded, of course no lien can be decreed, and this equitable action must fail.

Counsel's proposition is based upon the rule that at common law the guardian can, in general, make no contract binding upon the person or estate of the ward. *Simmons v. Almy*, 100 Mass. 229; 1 Pars. Cont. 134-136; Schouler, Dom. Rel. 463; *Stevenson v. Bruce*, 10 Ind. 397; *Tenney v. Evans*, 14 N. H. 343. This rule seems to be sanctioned by a strong preponderance of authority, so far as *common-law actions* are concerned. In such actions, the guardian's contract and liability, except for necessities under certain circumstances, are in general dealt with by the creditor as purely *personal*. But this is not an action at law, nor is it against the wards or their estate, generally. It is a suit in equity for the enforcement of a statutory lien upon a specific portion of the wards' property. The land and the rents recovered in the original Reithman suit belong to a trust estate; but, by virtue of the statute, they are nevertheless, it is claimed, incumbered with the attorney's lien.

We have already decided that, in general, the attorney's lien upon a judgment recovered by him, and belonging to his client, reaches the fruits of such judgment, though realty be the subject-matter in controversy. We have also held that this lien may be enforced, by a suit in

equity, directly against the property burdened therewith. Are these conclusions regarding the force and effect of the statute erroneous, and is the statute itself inapplicable, where the fruits of the judgment recovered, whether consisting of money or land, become part of a trust estate?

The statutory guardian in Colorado is invested with the general charge and management of the ward's estate, *real* as well as personal. Such control is, of course, subject to the limitations, express and implied, contained in the statute. The guardian is also authorized to prosecute and defend all cases relating to the ward's estate. It is his duty to recover the ward's real property when wrongfully appropriated or withheld, and to demand, sue for and receive all moneys belonging to the ward.

It might have been better had Mrs. Kershow first obtained from the probate court an express command or license to institute, and prosecute to judgment, the original suit against Reithman; but she and the other guardians would have been derelict in the discharge of their official duty had they failed, either with or without such consent, to proceed as they did. Their power and authority in the premises, however, could not now be successfully questioned, nor is there any attempt to challenge them. That suit was instituted for the benefit of the wards. The relation of attorney and client may have existed between plaintiffs and the guardians; yet the suit was prosecuted in the name of the wards, and they were the *real clients*, as well as the real parties in interest. The services of plaintiffs added greatly to the value of the wards' estate, without in the least benefiting the guardians, who neither sought nor derived any personal advantage through the suit. In making and continuing the contract of employment with plaintiffs, the guardians acted solely in their official capacity. There appears to have been no intention, either on the part of plaintiffs to look to the guardians alone for

compensation, or on the part of the guardians to incur individual liability in connection therewith. This compensation will ultimately become a charge upon the whole of the estate, should the right to treat it as a direct and superior charge upon a specific part of the estate be denied. Sustaining the lien avoids circuitry of proceeding, as well as increased expense and annoyance; therefore the true interest of the wards themselves, like that of all other persons concerned, will be best subserved by recognizing the application of the statute.

While the guardian who employs counsel in behalf of the estate is ordinarily regarded as the client, a court of equity, acting under the lien statute, should so far disregard this technical rule as to recognize the clientage of the real party in interest; and, after careful deliberation, we have no hesitancy in declaring that such a court, governed by the considerations above mentioned, and others that might have been but are not stated, should enforce the lien in the present as in other cases. It is believed that this is a question of first impression in Colorado; and, if the above conclusion can be said to conflict with the position sometimes taken in relation to the attorney's charging lien and trust funds, we feel at liberty to recognize the foregoing modification thereof,—sanctioned, as we think, by reason as well as the statute.

Fourth. If the views above stated be correct, it follows that the three guardians preceding Patterson are not necessary parties defendant to the present proceeding. Their official character wholly terminated prior to the rendering of the decree in the first suit against Reithman; and, if they were liable at all, their liability is ignored by plaintiff, so far as this proceeding is concerned.

Fifth. The objection of counsel for appellant to the testimony of plaintiffs themselves must be overruled. If the present suit can be regarded as in any sense within the purview of section 3641, General Statutes, relied on by appellants in support of this objection, the evidence men-

tioned was nevertheless admissible; for the facts to which plaintiffs testified "occurred" subsequent to the decease of the defendants Fillmores' ancestor; and hence this testimony is within the first exception stated in the section named.

Sixth. The assertion that there was a misjoinder of parties plaintiff will not be sustained. It has been said that "the court exercises a sound discretion, without adhering to any inflexible rule, in determining whether there has been a misjoinder of parties in equity." 1 Daniell, Ch. note 3, p. 303. The supposed misjoinder in this case is due to the admission of Macon into the firm of Wells & Smith after the employment began; thus in effect creating a new partnership. The object of both plaintiff firms was to secure a lien upon the same funds and the same premises for services rendered to the same parties in the same proceeding. Both firms, and the individuals composing them, were in exactly the same manner interested in the result of the suit, and in the property sought to be subjected to the attorney's lien. Under these circumstances, and in view of the equitable principle above stated, we would hesitate in holding that there was such a misjoinder of parties plaintiff as rendered the complaint, or the proceeding in equity, obnoxious to objection, by demurrer or otherwise.

But it is unnecessary to further discuss or to determine this question of pleading. The alleged misjoinder appears on the face of the complaint. When the demurrer was overruled, appellants filed their answer and went to trial. By so doing they waived their right to be heard in this court upon the present objection. Bliss, Code Pl. § 417; *Tennant v. Pfister*, 45 Cal. 270; *Schoelkopf v. Leonard*, 8 Colo. 159; *Webb v. Smith*, 6 Colo. 365; *Green v. Taney*, 7 Colo. 278.

Seventh. As to the alleged conflict between the testimony of Wells, on one side, and Patterson, Irwin and Charles, on the other, it is sufficient to say that, so far as

there is any real and material inconsistency, the testimony of Wells is fortified by that of other witnesses, and also by circumstances in evidence. We would not feel justified in holding that the referee and the court erred in their finding as to the making and continuance of the original contract.

Eighth. Finally, it is claimed that the compensation allowed in this case is excessive. The amount is large, but the services extended through a series of years, in different courts. Some of the questions litigated in the original suit seem to have been complicated and difficult. The result of the proceeding was a victory for the wards, and the fruits of the victory were upwards of \$20,000 in value. Upon the question as to what would be a reasonable compensation for all the services rendered, ten disinterested witnesses were sworn as experts, all of whom rank among the leading members of the bar of the state. Eight of these experts estimated the value of such services at various sums, not less than \$6,000, nor more than \$8,000; the two other estimated the same at from \$2,500 to \$3,000. It is evident that the referee and court found in accordance with the decided weight of expert testimony; and, under all the circumstances disclosed, we are not prepared to say that their finding and judgment are wrong.

We have not overlooked the fact that the attorney's lien statute, as adopted in 1861, re-adopted in 1868, and republished in 1876, contained the adverb or conjunction "when," instead of the relative pronoun "which" (found in the General Statutes), at the beginning of the last clause thereof. But this is a matter of no consequence, for with either of the words the legislative meaning is clearly the same. That body intended, in the part of the section referred to, to say that the lien conferred therein should be enforced by the proper civil action.

Perceiving no fatal error in the record before us, the decree of the district court will be affirmed.

Affirmed.

WHITSETT, EX'X, V. UNION DEPOT & R. CO. ET AL.

1. In the absence of any constitutional restriction, the power of the legislature to vacate streets and highways, or to invest municipal corporations with this power, cannot be doubted. There is nothing in our constitution prohibiting its exercise except by special legislation.
2. The city of Denver was invested by its original charter with authority to open, alter, abolish, * * * streets, avenues, * * * and this provision has been continued in the several amendments since made.
3. A municipal corporation is not warranted by law in exercising its power to vacate streets in an arbitrary manner and without regard to the interest and convenience of the public or of individual rights. But where the power exists and has been duly exercised, the fact that the vacating ordinance provides for the use which is to be made of the street does not aid a property holder who seeks to annul the ordinance on the ground that he is interested in keeping the street open.
4. The rule is that, for any act obstructing a public and common right, no private action will lie for damages of the same kind as those sustained by the public, although in a much greater degree.

10	243
13	508

10	243
21	450

10	243
15a	89

Error to District Court, Arapahoe County.

THE facts are stated in the opinion.

Messrs. WELLS, MACON and MCNEIL, for plaintiff in error.

Messrs. TELLER and ORAHOD and B. M. HUGHES, for defendant in error.

BECK, C. J. Richard E. Whitsett, since deceased, brought an action in the district court of Arapahoe county to enjoin the defendant in error, the Union Depot & Railroad Company, from completing the structure then commenced, and since completed, which extends across Seventeenth street, in the city of Denver, near its westerly terminus, and known as the "Union Depot;" and to compel said defendant, and the Denver, South Park & Pacific Railroad Company, to remove the obstructions

which they had erected and placed in said street, and the other streets and alleys mentioned in the complaint. Damages, general and special, were prayed for injuries alleged to have been sustained by the plaintiff, and for such as might be sustained before final judgment in the action. The complaint avers that plaintiff is the owner of certain lots described therein, which abut on the streets obstructed, on which are buildings for residence and business purposes; that his lots on Seventeenth street are situated beyond said obstructions from the business center of said city, so that, by reason of the obstructions therein, he, his tenants and other citizens, cannot pass continuously along said street to and from the business center of the city, as they otherwise could and were accustomed to do, but are compelled to go around the obstructions, and are thus made to travel a greater distance in passing to and from said business center. The complaint sets out in detail the history of the location of the Denver city town site, in the year 1859, upon the unsurveyed public domain; the survey, subdivision and platting thereof into lots and blocks, intersected by streets and alleys; the recognition and approval of said subdivision and plat by the residents of said town site, and by the authorities of the city of Denver; the incorporation of said city thereafter, under the name of the "City of Denver," by an act of the territorial legislature passed in 1861; the entry by the probate judge of Arapahoe county at the United States land office, in 1865, of said town site, under and in pursuance of the town-site acts of congress; the conveyance by said probate judge to the parties entitled thereto of the several lots and blocks occupied by them respectively, and the further conveyance in fee to the city of Denver, by said probate judge, of all the streets, alleys and public grounds located and set forth in said survey and plat. Plaintiff avers that, ever since the survey and subdivision of the town site, he has been a resident of Denver; but does not say that he was an occupant of

either of the lots alleged to be injured by the construction of the union depot, or that he acquired his title thereto from the probate judge, or from any of his successors in office. He asserts the legal proposition that the probate judge, after his entry of the town site, and that the city of Denver, since the conveyance to it of the streets, alleys and public grounds referred to, held, and that said city now holds, all the several streets and alleys surveyed and set down in the said plat (which included those now obstructed), in trust, that the same should be ever kept and used solely as public highways; and, upon the abolition or vacating of any of said streets and alleys by lawful authority, to release and convey over to the lawful owners of the abutting lots all that part of the streets and alleys so vacated, from the boundary of such lots to the center of said streets and alleys respectively.

Prior to the happening of the grievances complained of the city council of the city of Denver had, by an ordinance passed on or about the 5th day of January, A. D. 1880, vacated a portion of the streets and alleys mentioned in the complaint, for the purpose of enabling said defendant, the Union Depot & Railroad Company, to build a union railroad depot at that point in the city, and to erect and make such other structures and improvements as were necessarily appurtenant to a union railroad depot. By this ordinance parts of Seventeenth and Wewatta streets were declared vacated, as were also the alleys in the four blocks abutting thereon, upon which the building and its appurtenances were to be constructed. After describing the parts of the streets and alleys vacated, its language is that they "be, and the same are hereby, vacated and abolished, and the same appropriated to the Union Depot & Railroad Company and its successors, for its and their sole use, occupancy and benefit, so long as it or its successors shall use the same for the purposes of maintaining a union depot, with necessary tracks, sidings and switches, leading to and from and about the

same, for the use of railroads, to be held, used and occupied henceforth by said company, its successors and assigns, for the uses and purposes aforesaid: provided, that if the said company, its successors and assigns, shall cease to use and occupy the said parts of said streets and alleys for the purposes aforesaid, then this grant to it and them shall cease and determine; but that the destruction of the proposed depot by fire shall not operate to determine this grant to it, its successors or assigns, unless it or they or either of them shall fail, neglect or refuse to build the same in a reasonable time after such destruction." While the plaintiff's lots abut on the streets vacated, none of them abut on the portions thereof vacated. The streets surrounding the several blocks in which his lots are situated remained open and unobstructed.

The ground stated in the complaint as the basis of the claim for special damages is that the plaintiff, on a certain day, was passing along Seventeenth street in a carriage, about his lawful business, and at the point in question was obliged to turn out of said street, and go around the obstructions placed therein, by a longer way than the lawful highway, and to pass over the railway tracks unlawfully placed in said street. The prayer of the complaint is that said ordinance be declared null and void; that the defendants mentioned be restrained from erecting further obstructions in or from occupying said streets and alleys; that they be required to abate and remove all obstructions which they have or shall have erected in Seventeenth street, or in any of said other streets and alleys, before final judgment; for \$500 damages, and for other relief.

The defendants demurred to the complaint, on the ground that the matters and things therein stated were not sufficient in law to be answered unto. The court sustained the demurrer, and, plaintiff abiding thereby, the court gave judgment dismissing the action. Plaintiff

iff then brought the cause to this court for review by writ of error. After the suing out of the writ of error the death of the plaintiff in error was suggested, and Emma C. Whitsett, executrix of the estate of the deceased, was duly substituted as plaintiff in error.

The errors assigned are that the court erred in sustaining the demurrer and in dismissing the complaint. The case presented differs in no material particular from the numerous cases wherein the authority of municipal corporations to vacate and abolish streets and alleys has been called in question. The rule established by these adjudications is that, in the absence of any constitutional restriction, the power of the legislature to vacate streets and highways, or to invest municipal corporations with this power, cannot be doubted. 2 Dill. Mun. Corp. § 666; *McGee's Appeal*, 8 Atl. Rep. 237, and authorities cited; *People v. Supervisors*, 20 Mich. 95; *Gray v. Land Co.* 26 Iowa, 387; *Hoboken v. Hoboken*, 36 N. J. Law, 540; *Brook v. Horton*, 68 Cal. 554.

Section 25 of article 5 of our state constitution prohibits the legislature from exercising this power directly. This section provides that "the general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Vacating roads, town plats, streets, alleys and public grounds." But this instrument contains no prohibition against the delegation of this power to municipal corporations. On the contrary, the restriction against the vacating of streets and highways by local or special legislative acts is an implication of the power of the legislature to authorize such acts to be done. As held in *Paul v. Carver*, 26 Pa. St. 223, this power must reside somewhere in every well-regulated government. There being nothing in our constitution prohibiting its exercise, except by special legislative act, we conclude the various municipalities may exercise this power when duly invested therewith.

The city of Denver was invested by its original charter

of November 7, A. D. 1861, with authority "*to open, alter, abolish, widen, extend, establish, grade, pave, or otherwise improve and keep in repair, streets, avenues, lanes and alleys, sidewalks, drains and sewers.*" Laws 1861, p. 487. This provision has been continued in the several amendments since made, including the amended charter approved April 6, 1877. Section 40 of the latter act provides that "the city council shall have power, within the jurisdiction of the city, by ordinance not repugnant to the constitution of the United States or the constitution of the state of Colorado," "to open, alter, abolish," etc., "streets, avenues, lanes and alleys." While the invalidity of this ordinance was asserted by the plaintiff, he did not question its formal and legal adoption by the city council.

The point is made by counsel for plaintiff in error that the city council was not authorized by its charter to grant the exclusive right of occupancy of the streets vacated to a private corporation, and to authorize the erection of permanent obstructions therein. A municipal corporation is not warranted by law, in exercising its power to vacate streets in an arbitrary manner, and without regard to the interest and convenience of the public, or of individual rights. But when the power to vacate exists and has been exercised with due regard to the interests both of the public and of private rights, the fact that the vacating ordinance provides for the use which is to be made of the street, or the portion thereof vacated, does not aid a property-holder who seeks to annul the ordinance, on the ground that he is interested in keeping the street open. The object to be accomplished in the present case may fairly be said to be one of great interest and convenience to the public. The establishment and construction of a union railroad depot for the use of all railroads entering within or centering in the city is a convenience not only to all residents of the city, but to the public generally. We are therefore of opinion that the

privileges granted to the Union Depot Company afford no ground for equitable interposition. If the plaintiff suffered no special injury peculiar to himself, and distinct from the general inconvenience experienced by the public, by the acts complained of, he has no standing in equity for injunctive relief. High, Inj. § 528.

The rule laid down in *City of Chicago v. Building Ass'n*, 102 Ill. 393, and in support of which many authorities are cited, is that, for any act obstructing a public and common right, no private action will lie for damages of the same *kind* as those sustained by the general public, although in a much greater degree. As we have already seen, none of the lots owned by the plaintiff abut on those portions of the streets or alleys mentioned which were vacated by the ordinance passed by the city council, but all are situated in other blocks. The streets in front of his several lots remained open and free from obstructions. These facts bring the case within the principle of the authorities cited, and within the case of *City of East St. Louis v. O'Flynn*, 10 N. E. Rep. 395, wherein the court say: "Here plaintiff's lot is not adjacent to the streets or alleys vacated. It is in another block. The access to and egress from his lot is not affected by the vacating ordinance passed by the city. The street in front and the alley in the rear of his property remain open as before, affording the same access to and egress from it. The inconvenience that would be occasioned to the plaintiff in going from the street in front of his house to a particular part of the city, on account of vacating and closing up certain streets and alleys in another block, is the 'same kind' of damage that would be sustained by all other persons in the city that might have occasion to go that way; and, although the inconvenience he may suffer may be greater in degree than to any other person, that fact would not give him a right of action."

For the reasons assigned we are of opinion that the

action of the district court in sustaining the demurrer and dismissing the complaint was proper. The judgment is therefore affirmed.

Affirmed.

10	250
17	10
17	13

10	250
19	390

10	250
4a	437

10	250
5a	129

10	250
16a	459

10	250
38	90
38	91

THORNILY V. PIERCE ET AL.

1. Under Code Civil Procedure, section 195, which authorizes either party to a suit, upon the refusal of the trial judge to sign a proposed bill of exceptions, to make such bill a part of the record by procuring and attaching to the bill "the affidavit of two or more attorneys of the court, or other persons who were present" at the trial, that the bill "is correct and true," the affidavits of attorneys who had no participation in or connection with the case tried are required; and the affidavit of one such other person is not sufficient.
2. Plaintiffs, in an action of replevin before a justice of the peace, recovered judgment for \$265. Defendant appealed to the county court, where a verdict was rendered for plaintiffs for \$365, an amount in excess of the justice's jurisdiction. Plaintiff did not offer to remit the excess. *Held*, that the court should have dismissed the action.

Error to San Juan County Court.

THE facts are stated in the opinion.

Mr. L. C. NORTHRUP, for plaintiff in error.

Messrs. HUDSON and SLAYMAKER and C. M. FRAZIER, for defendants in error.

MACON, C. This was an action of replevin for certain goods and chattels claimed by plaintiffs below, Pierce and Thomas, under a sale to them by G. J. Thomas, and held by the defendant below, as sheriff of said county, under certain writs of attachment issued by the creditors of said G. J. Thomas. The action was commenced before a justice of the peace of said county, and judgment rendered therein against plaintiff in error, from which

he appealed to the county court of said county, where the action was tried to a jury, and a verdict found for defendants in error for the sum of \$365. A motion for a new trial was filed by defendant below, and overruled by the court, and judgment rendered upon the verdict for the whole amount found by the jury, to which defendant excepted, and comes to this court. No written pleadings, save the affidavit in replevin, were filed in the justice's court, or the county court. By the transcript sent up from the justice's court to the county court it appears that no claim was made by the plaintiffs below for any special damages growing out of the detention of the goods by the defendant; but the value of the property was stated to be \$265. In the county court, so far as we can ascertain by anything before us in the record, no claim for special damages was made.

The county judge refused to sign and seal the bill of exceptions presented by defendants' counsel, so far as the same purported to set forth the evidence given on the trial, but signed and sealed what purports to and is intended to, be a bill of exceptions, so far as to show the instructions given to the jury by the court. Upon the refusal of the county judge to sign the bill of exceptions, as aforesaid, defendant endeavored to avail himself of the provisions of the Code of Civil Procedure, section 195, which authorizes a party, upon the refusal of the judge to sign the bill of exceptions, to procure the affidavits of "two or more attorneys of the court, or other persons who were present at the trial," to make affidavit of the truth of the facts set forth in the bill of exceptions. In this endeavor defendant failed. The statute evidently requires that the "two or more attorneys of the court" should be those who had no participation in, or connection with, the case in which their affidavits are sought. *Simon v. Weigel*, 10 Iowa, 505; *St. John v. Wallace*, 25 Iowa, 21. In this instance the two attorneys who made these affidavits were the two who conducted the case be-

fore the county court, and who are in this court prosecuting this writ of error.

Plaintiff in error also has filed in this court the affidavit of one Bradford, who was then under-sheriff of said San Juan county. It being seen that the affidavits of the two attorneys alluded to are not sufficient, is the affidavit of one "other person" sufficient? We think not, for the reason that the statute uses the term "other persons," which is in its plain meaning plural; and because, if two or more attorneys of the court are required in such case, there can be no reason why at least two "other persons" should not be necessary.

As to the first assignment, that the court erred in not dismissing the cause for the reason that the justice of the peace had no jurisdiction of the matter, we think the point is well taken. The trial was had before the justice of the peace on the 30th day of May, and in the county court on the 13th day of June following. Before the justice of the peace, the plaintiffs recovered \$265, and on the trial in the county court, about two weeks later, they recovered \$365. Upon the coming in of the verdict, which was \$65 beyond the jurisdiction of the justice, and upon failure of the plaintiffs to remit this excess of \$65, the court should have dismissed the suit.

The judgment should be reversed and a new trial granted.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment is reversed and the cause remanded.

HELM, J. (*dissenting*). I concur in the conclusion that the judgment must be reversed, but do not accede to the assumption that by remitting the excess over \$300 of the verdict in the county court, plaintiff could have cured the jurisdictional defect in question. I have serious misgivings as to the correctness of the legal proposition thus implied.

The reversal is based upon the ground that there was a want of jurisdiction over the subject-matter. If this were not so, the judgment could not be reversed, because the objection was not taken in the court below; and it is a rule of practice, too well established to admit of discussion, that, where the parties appear and trial is had, no other objection relating to jurisdiction, save this, can be for the first time presented in the supreme court.

When the verdict for \$365 was returned to the county court, it became the duty of that court to dismiss the action, because under the statute the justice of the peace had no jurisdiction over the subject-matter. Gen. St. §§ 1924, 1938. I understand the law to be that where the jurisdiction of a court is regulated by statute, the court is imperatively limited to the subject-matter thus specified. It cannot, even by express stipulation of the parties in writing, be clothed with jurisdiction over a subject-matter not covered by the legislative enactment.

If I am right in these views, it inevitably follows that plaintiff in the present action was wholly powerless to cure the defective jurisdiction and validate the proceeding by remitting \$65, or any other sum, from the verdict.

I must not be understood as saying that a creditor cannot forgive a portion of his just debt, and thus bring his cause within the jurisdiction of a justice; but, if such be his purpose, he must remit before he begins his suit. Having done so in some proper manner, his cause of action is within the statutory jurisdiction prescribed for the court, and the proceeding becomes regular from its inception.

The test of jurisdiction in cases like the one at bar is the verdict of the jury in the county court. If the plaintiff proves himself entitled to more than \$300, it is his own fault that his recovery becomes void. If, on the other hand, a perverse jury or court, as the case may be, insists upon giving him a larger verdict or judgment

than he proves, and one for more than \$300, I know of no remedy for him except through a new trial.

The case of *Cramer v. McDowell*, 6 Colo. 369, is not relied on in the principal opinion. The intimation in that opinion on this subject is used by way of argument rather than as announcing a rule of law; but if it fairly leads to an inference contrary to the foregoing conclusion, I think the language there used should be qualified.

Reversed.

10 254
12 474

SOUTH PUEBLO NEWS PRINTING AND PUBLISHING COMPANY V. MOORE.

1. When a county court by an order grants an unconditional change of venue, and afterwards, by another order, requires the party seeking the change to perfect it by paying accrued costs, the latter order is in effect a mere modification of the former, and is invalid; the county court having no power to require payment of costs as a condition precedent.
2. Under the statute (Gen. St. ch. 22, § 20), changes of venue from county courts may be taken to the county court of any adjacent county, provided that, if no substantial objection is shown, the change shall be taken to the district court of the same county. A county court ordered a change of venue to "the district court of the third judicial district," which district included several counties. *Held*, that the statute did not authorize the change to any district court but that of the county where the cause was pending, and that the order was uncertain as to the court or county to which the change was granted.

Error to Pueblo County Court.

ON the 20th day of September, 1883, the following order was entered in the case: "Now, on this day, this cause coming on to be heard, plaintiff and defendant being present by their attorneys, J. F. Drake, Esq., attorney for plaintiff, and Patton & Urmey, attorneys for defendant; and thereupon the attorneys for the defendant filed a motion for a change of venue; and the court,

after hearing the motion and affidavit of A. Corder, Esq., read, and the argument of counsel thereon, ordered that the said motion be, and the same is hereby, sustained, and that the said cause be removed to the district court of the third judicial district." On the 22d day of November, 1883, and at the September term of said court, the following order was entered in the case: "Now, on this day, comes the plaintiff, by his attorney, J. F. Drake, Esq., and moves the court for an order on the above-named defendant, to perfect its application for a change of venue to the district court, by requiring said defendant to pay costs in the above-entitled action forthwith; and, in case of default of such payment, to set the said case for hearing at an early day. And thereupon the court having heard the motion read, and the arguments of the plaintiff's counsel thereon, and being fully advised in the premises, it is ordered by the court that the said motion be, and the same is hereby, sustained." On the 23d day of November, 1883, and at the September term of said court, the following order was entered in the case: "Now, on this day, the defendant having failed to comply with the preceding order requiring the defendant to perfect its change of venue by paying all costs forthwith, it is ordered by the court that this cause be, and the same is hereby, set for hearing on the merits on Saturday, November 24, at 2 P. M." On the 11th day of April, 1884, the cause coming on for hearing, the defendant not appearing, a jury being waived, the case was tried to the court, and judgment was entered against the defendant, and in favor of the plaintiff, for the sum of \$284.83, and costs of suit.

The case is brought here upon a writ of error, and the following errors assigned: "(1) The court erred in making a rule on defendant, requiring it to pay the costs theretofore accrued in said cause, as a condition precedent to preparing a transcript and sending the same to the district court, after a change of venue had been granted.

(2) The court erred in making a rule on defendant, or taking further proceedings upon the motion of defendant, after a change of venue had been granted. (3) The court erred in proceeding further in said cause after a change of venue had been granted, except to prepare a transcript of the proceedings in said cause, and transmit the papers in the same to the district court. (4) The court erred in proceeding to set the said cause for hearing over the protest of defendant after a change of venue had been granted. (5) The court had no jurisdiction to proceed in said cause after a change of venue had been granted. (6) The court erred in hearing said cause. (7) The court erred in entering judgment in said cause."

Messrs. PATTON and URMY, for plaintiff in error.

Mr. J. F. DRAKE, for defendant in error.

RISING, C. The first assignment of error raises the only question we deem it necessary to consider. The order entered on the 20th day of September was an absolute and unconditional order for a change of the place of trial of the action. The order entered on the 22d day of November, and at the same term of court, was, in effect, a modification of the order of the 20th of September, although it purports to be an order requiring the defendant to perfect the change of venue under the order made for the change. If the court did not err in making the order of November 22d, then the order entered on the 23d day of November was not erroneous. It follows, then, that in considering the first assignment of error we have only to look to the order granting a change of the place of trial, and the order requiring the payment of costs by the defendant, as a condition precedent to entitle it to perfect the change, to determine the question raised. If there is no authority of law for the imposition of such terms, then the action of the court cannot be sustained. In the case of *O'Connell v. Gavett*, 7 Colo. 40-42, this

court held that, upon the granting of an application for a change of the place of the trial under the code, the general rule that costs must abide the event of the suit must apply, and that there was no authority for requiring the payment of accrued costs as a condition upon which the change could be had. The modification of the order, imposing, as terms, the payment of costs, was erroneous.

It is urged by defendant in error that the order changing the place of trial was void for uncertainty, in that it directed the removal of the case to the district court of the third judicial district, and did not specify the county in said district in which the trial should be had. Section 20 of chapter 22 of the General Statutes provides that "changes of venue from any of the county courts may be taken for the same causes provided for changes of venue in the district courts, and the venue, in all cases, shall be changed to the county court of any adjacent county wherein the cause or causes necessitating such change do not exist; provided, that, if no substantial objection is shown to exist thereto, the venue shall be changed to the district court of the same county." While the third judicial district includes several counties, the statute did not authorize the court to remove the case to the district court of any county other than the same county in which the cause was pending; so that, under the statute, there was no uncertainty as to the court or county to which the order for removal referred.

The judgment should be reversed.

We concur: MACON, C.; STALLCUP, C.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the county court is reversed.

Reversed.

RHODES ET AL. V. HUTCHINS.

10	258
12	260
10	258
11a	499
10	258
134	137

1. Under Code, section 60, the claim after judgment that a complaint is insufficient can only be sustained on the ground that the facts contained therein, even if well stated, constitute no cause of action.
2. A complaint stating, in effect, that the defendants made and delivered a promissory note to plaintiff, setting forth a copy of the note, and the amount claimed thereon, with interest from a certain date; that no part of the same has been paid,—contains sufficient facts to sustain a judgment under Code, sections 80, 81.

Appeal from County Court, Arapahoe County.

THIS was an action by Hutchins against appellants upon a promissory note. The allegations of the complaint were as follows:

“*First.* That the amount involved in this action does not exceed the sum of \$2,000.

“*Second.* That the defendants are indebted to the plaintiff on a certain promissory note, payable to the plaintiff or order, of which the following is a copy, with no credits or indorsements thereon; that the payee, by the name, style and description of S. A. Hutchins, mentioned in the promissory note herein set forth, and Samuel A. Hutchins, the plaintiff above named, are one and the same person.

“ ‘\$1.050. DENVER, COLO., December 3, 1881.

“ ‘One year after date, we or either of us promise to pay to the order of S. A. Hutchins, ten hundred and fifty dollars, at the Exchange Bank of Denver, Colorado, with interest at the rate of ten per cent. per annum, from date until paid; value received.

“ ‘A. S. RHODES.

CONRAD FRICK.

“ ‘J. H. LESTER.

ISAAC BRINKER.’

“ ‘M. B. CARPENTER.

“*Third.* That there is due and owing the plaintiff from defendants on said note the sum of \$1.050, and interest thereon from December 3, A. D. 1881.

“*Fourth.* That defendants have not yet paid the sum

of money above mentioned, or any part thereof, to said plaintiff.

“Whereupon the plaintiff asks judgment against these defendants for the sum of \$1.050, with interest thereon, and the costs of suit.”

The defendants answered to the same as follows: “The defendants, for answer to the complaint, say that they alone are not indebted to the plaintiff on a note or otherwise for the sum mentioned; that as to whether or not the copy of note in said complaint mentioned is a true copy of a note they signed, or whether or not S. A. Hutchins and Samuel A. Hutchins are one and the same person, these defendants have not and cannot obtain sufficient information or knowledge, save that in the complaint, upon which to base a belief, and on information and belief deny the same; that these defendants do not alone owe, nor is there due from them on said note, or any note alone, the sum of ten hundred or other dollars.” Both were verified.

To which answer plaintiff filed a motion as follows: “And now comes the plaintiff, by Edward O. Wolcott, his attorney, and moves the court — *First*, that the answer of the defendants heretofore filed herein be stricken out, upon the ground that the same is sham and irrelevant; *second*, that the defendants’ said answer be stricken out, upon the ground that the same is immaterial and insufficient; *third*, that the plaintiff have judgment upon the pleadings against the defendants for the amount demanded in this complaint; *fourth*, that the plaintiff have judgment against the defendants for the amount demanded in this complaint.”

The same was duly heard; whereupon the court adjudged as follows: “It is considered by the court that the said motion be, and the same is hereby, granted, and that judgment be entered herein in favor of said plaintiff against said defendants in the sum of \$1,257.08; wherefore it is ordered that the plaintiff have and recover, of

and from the said defendants, the sum of \$1,257.08, together with his costs in this behalf incurred to be taxed; and that execution issue therefor." Defendants excepted, and bring the case here on appeal.

The errors assigned are as follows: "(1) The court erred in sustaining the motion and striking the answer from the files. (2) The court erred in rendering judgment for appellee. (3) The court erred in striking the answer, and rendering judgment for appellee, because the complaint did not state facts sufficient to constitute a cause of action. (4) The complaint was made up of conclusions of law, and stated no facts, and not sufficient to constitute a cause of action." The errors assigned as to the sufficiency of the complaint are the only errors argued and relied upon by counsel for appellants.

Mr. M. B. CARPENTER, for appellants.

Mr. E. O. WOLCOTT, for appellee.

STALLCUP, C. Section 65 of our code provides for striking sham answers. The action of the court, on motion of plaintiff to strike the answer and give judgment on the pleadings, was in effect to adjudge that the same was a sham answer, and that, upon the pleadings, the plaintiff was entitled to judgment. It seems to be conceded in the argument of counsel here that the answer was a sham answer, but it is contended on the part of appellants that the complaint was insufficient to support the judgment, and for that reason the judgment should be reversed. The omission of Lester in the action was warranted by section 14 of the code. The court was not asked to require the complaint reformed or improved in its structure. The assignment of its insufficiency after judgment can only be sustained on the ground that the facts contained therein, even if well stated, constitute no cause of action. Sec. 60, Code; *Bethel v. Woodworth*, 11 Ohio St. 396.

In effect, it is stated in plaintiff's complaint that defendants made and delivered to plaintiff their certain written promise, by the terms of which there is due and owing to him from defendants the sum of \$1,050, and interest thereon from the 3d day of December, 1881, and that such sum remains unpaid. A copy of said promise or promissory note is set out in the complaint, by which it is shown that defendants did so promise, and that the said sum is accordingly due to plaintiff thereon from the said defendants; and it is stated to be a true copy; and then it is stated that no part of the same has been paid. So, under the liberal construction *required* by our code, we feel bound to hold that the complaint does contain facts sufficient to sustain the judgment. Secs. 80, 81, Code.

The judgment should be affirmed.

We concur: MACON, C.; RISING, C.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment below is affirmed.

Affirmed.

MARIX V. STEVENS.

In passing upon a demurrer to a pleading on the ground that it does not state facts sufficient to constitute a cause of action, the court will only inquire whether it can gather from the pleading the requisite facts, ignoring all immaterial matter and unnecessary allegations. Allegations of immaterial matters may be stricken out on motion.

Appeal from Superior Court of Denver.

THE complaint alleges that defendant on the 27th day of January, 1883, rented and leased of the plaintiff two rooms for lodgings, and agreed to pay plaintiff, in advance, the sum of \$60 as rent therefor, for the month

next ensuing; that defendant so leased and rented, and had the right to the possession of, said rooms, and the use and enjoyment thereof, at all times during the month ensuing, from said 27th day of January, 1883; that defendant has not paid said sum of \$60 or any part thereof. Defendant demurred to the complaint, alleging for cause that it failed to state a cause of action; and that it was ambiguous, unintelligible and uncertain, in failing to show whether defendant used and enjoyed the premises, or merely had the right to the possession, use and enjoyment of the same. Demurrer overruled, and, defendant failing to plead, judgment rendered for plaintiff, from which judgment defendant appealed, and assigned for error the action of the court in overruling the demurrer to the complaint.

Messrs. SMITH and AUSTIN and WARD and REUTER, for appellant.

Messrs. JNO. W. HORNER and PETER PALMER, for appellee.

RISING, C. It is urged by appellant, in argument, that the allegations of the complaint do not show a contract for the leasing of realty, but a contract for lodging, personal in its nature, and upon which defendant can only be held liable in damages for breach of contract, as upon actions for the breach of contracts for the purchase of personal property.

There is nothing in the complaint showing that the defendant was a mere lodger or that the contract was a contract for lodging. It states a cause of action for the non-payment of a definite and certain sum, due and payable under a contract of lease of certain real estate. The allegations of the complaint that defendant rented and leased of the plaintiff two rooms; that defendant agreed to pay the plaintiff the sum of \$60, in advance, as rent for said premises for the ensuing month; that said sum

had not been paid,—contain a statement of facts sufficient to show a right of recovery. The further allegations of the complaint, that defendant so leased and rented said premises, and had the right to the possession thereof, and to the use and enjoyment of the same, at all times during said month, are wholly unnecessary and immaterial averments, in no way limiting or controlling the other statement of facts. In passing upon a demurrer to a pleading, on the ground that it does not state facts sufficient to constitute a cause of action, the court will only inquire whether it can gather from the pleading the requisite facts, ignoring all immaterial matter and unnecessary allegations. Bliss, Code Pl. § 425; *Herfort v. Cramer*, 7 Colo. 483, 488.

The second ground of demurrer, that the complaint is ambiguous, unintelligible and uncertain, in failing to show whether defendant used and enjoyed the premises or merely had the right to the possession, use and enjoyment of the same, is not well taken. The facts admitted by the demurrer are that defendant leased of the plaintiff certain realty, for a definite term, at an agreed rent, and that said rent is due and unpaid. The action is brought to recover such rent, and is based upon the express agreement to pay a fixed and certain sum. The allegations relating to the use and enjoyment, or the right to the use and enjoyment, of the premises, constitute no part of the facts upon which the cause of action rests, and hence there can be no conclusion of law from such allegations upon which an issue of law can be joined. These allegations might have been stricken out on motion. The judgment should be affirmed.

We concur: MACON, C.; STALLCUP, C.

PER CURLAM. For the reasons assigned in the foregoing opinion the judgment of the superior court of the city of Denver is affirmed.

Affirmed.

10	264
1a	305
1a	456

10	264
20	173
4a	110

10	264
8a	483

10	264
25	258

MALLAN V. HIGENBOTHAM ET AL.

Under Code Colorado, section 397, "every direction of the court made in writing, and not included in a judgment, is an order, and an application for an order is a motion;" and under sections 398 and 399 notice must be given of all motions in a case. Therefore it is error for a court, after the statutory time for answering has expired, to allow a defendant, without notice to the plaintiff, to withdraw a demurrer previously filed, and to file an answer and cross-demand to the complaint.

Error to District Court, Lake County.

THE case is stated in the opinion.

Mr. ENOS MILES, for plaintiff in error.

Mr. E. M. HULBARD, for defendants in error.

STALLCUP, C. The main question raised by the assignments of error, and discussed and fairly presented for the opinion of this court by the briefs of the respective counsel, is whether there was error in the following proceedings of the district court, to wit: *First*. Was it error for the court, after the statutory time for answering the plaintiff's complaint had expired, and without notice to the plaintiff, to permit the defendants to withdraw their demurrer previously filed, and to file instead an answer to the complaint, accompanied by a cross-demand against the plaintiff? *Second*. Was it error for the court, on motion of the defendants, and without notice, to rule the plaintiff to reply to said answer and cross-demand within a stated time, and afterwards on like motion, and without notice, to enter the plaintiff's default for failure to comply with the rule, and thereupon to give judgment for the defendants for the amount of their cross-demand?

Section 397 of the code is as follows: "Every direction of the court made or entered in writing, and not included in a judgment, is denominated an order; an

application for an order is a motion;" and sections 398 and 399 require notice of all motions in a case, except those made during the progress of a trial, and provide how the same shall be given. We are not all of the opinion that an order and notice are necessary to authorize a party to withdraw his demurrer, and so dispose of it, and therefore do not determine the same. We are all of the opinion that after the withdrawal of a demurrer, after the expiration of the statutory time for answering, notice to the adverse party, as required by sections 398 and 399, is necessary to warrant the court in granting the motion for the order allowing the filing of an answer. It therefore follows that the order in this case granting the motion to file the answer and cross-demand was a necessary order, to be made upon motion therefor, and of which the plaintiff was entitled to notice as provided by sections 398 and 399, and the subsequent proceedings upon such answer and cross-demand, to and including the judgment against the plaintiff, were unwarranted, and therefore erroneous. *Cates v. Mack*, 6 Colo. 401.

The judgment should be reversed and the case remanded.

We concur: RISING, C.; MACON, C.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the district court is reversed and the cause remanded for a new trial.

Reversed.

10	265
13	401
10	265
1a	117

CRANE ET AL. V. ANDREWS ET AL.

1. An answer which is evasive, frivolous, and largely made up of legal conclusions, may be properly stricken from the files on motion.
2. An appeal bond, the condition of which is "to prosecute the appeal with effect and without delay, and pay whatever judgment might be rendered against appellant on the trial or dismissal of his appeal in the district court," is clearly enough expressed to support an ac-

tion, when there is a neglect to pay the judgment rendered in the district court.

3. The penalty in an appeal bond is not the limit of the liability of the obligors therein, in an action thereon, but recovery may include the costs of the suit and damages for the detention of the debt assumed in the bond.
4. There is no distinction between the extent of the liability of the principal and surety in an appeal bond.

Appeal from County Court, Lake County.

IN 1880 Crane & Co. sued Andrews & Co. in the county court of Lake county, and obtained a judgment against them for \$276.35, from which Andrews alone appealed to the district court of said county, and executed an appeal bond in the penal sum of \$600, with J. J. Moynahan and S. D. Bowker as sureties. On the trial of the case in the district court, judgment was rendered against Crane & Co., which, on appeal to this court by Crane & Co., was reversed, and remanded for a new trial. The case was retried in the district court of Lake county, on the 26th day of April, 1883, and judgment rendered for Crane & Co. in the sum of \$399.25 and costs. This judgment was not paid by Andrews & Co., nor the sureties, nor any of the costs in the district court, nor in this court, except \$2.50. Whereupon suit was brought upon the appeal bond in the district court of Lake county. To the complaint defendants interposed a demurrer that: *First*, "the complaint does not state facts sufficient to constitute a cause of action; and, *second*, that said complaint is ambiguous, unintelligible and uncertain;" which was overruled, and defendants filed the following answer:

"STATE OF COLORADO, COUNTY OF LAKE, SS.—IN THE
DISTRICT COURT OF SAID COUNTY.

"*Martin H. Crane et al. vs. E. H. Andrews et al.*

"E. H. Andrews and J. J. Moynahan, two of the defendants in the above-entitled action, answering the

plaintiffs' complaint, herein, say (1) that they have not information sufficient to form a belief as to whether the plaintiffs were or are partners, as is alleged in said complaint, nor can they obtain any; that they were not at any time whatsoever indebted to the plaintiffs in any sum of money whatsoever, on the pretended bond mentioned in said complaint; that they have never incurred any liability upon said alleged bond, nor has there ever been any breach of the condition thereof on the part of these defendants; that the plaintiffs never 'received' or recovered a judgment in the district court against the defendant Andrews for the sum of \$599.25, as seems to be intended to be alleged in said complaint, although these defendants are not sure that they have discovered the meaning of such complaint. (2) And for a further defense to this action these defendants say that the pretended bond mentioned in the complaint herein is unintelligible and inoperative, and that no liability has been incurred by this defendant on account thereof. Wherefore these defendants pray judgment."

Upon the motion of the plaintiffs, this answer was stricken from the files, on the ground that it was frivolous and evasive, and presented no issue of fact; and defendants electing to stand by their answer, judgment was rendered against them on the 10th day of April, 1884, upon the bond, for the sum of \$657.30, to which defendants excepted, and appealed to this court, and assign three errors in the judgment and proceedings below: "*First*, the district court erred in striking out the answer of the defendants; *second*, the district court erred in giving judgment for the plaintiffs; *third*, the district court erred in the amount of the judgment rendered."

Messrs. MAXWELL and PHELPS, for appellants.

Mr. WM. FLETCHER, for appellees.

MACON, C. The answer is evasive, frivolous and largely made up of legal conclusions, which must have

been advanced in the argument on the demurrer, and overruled by the court, and it is not attempted to be defended by appellants in this court. The district court did right in striking it from the files.

The second assignment goes to the sufficiency of the bond in suit to maintain the action against the obligors. While it is a peculiar instrument in some of its terms and conditions, and incomplete, affording less protection to the appellees than a bond in the statutory form would have done, it contains the conditions to prosecute the appeal with effect and without delay, and pay whatever judgment might be rendered against appellant on the trial, or dismissal of his appeal in the district court; and it is for the breach of the latter condition that this suit was instituted. The conditions of an appeal bond are separate, and it is seldom that all are broken by the obligor, but suit for breach of any material condition therein may be maintained. In this case the condition broken, as alleged in the complaint, is the neglect to pay the judgment of \$399.25, and the costs in the district court, and those in this court, which were all due, and should have been paid, according to the terms and conditions of the bond, on the 26th day of April, 1883; the obligation to do which is clearly enough expressed in the bond. The district court did not err in holding the bond sufficient to support the action.

The third assignment is founded upon the position that the penalty in the bond is the limit of the liability of the obligors therein, in an action on the bond, and that this limited recovery includes the costs of the suit, and damages for the detention of the debt assumed in and by the bond; and as the judgment here is for more than the penalty of the bond sued on, it is erroneous. It is needless to cite authorities to the doctrine that at this time the penalty in such bond is not considered as the debt, and is not the measure of recovery where the sum secured is less than the penalty. But where such sum is

equal to or greater than the penalty, the amount of the latter may be recovered, with damages for the detention thereof, from the breach of condition to the time of trial, with costs of suit. This rule has not been settled without great conflict of decision, and is not the rule in some of the United States, and cannot be said to be settled in England.

Sutherland, in his book on Damages, page 14, volume 2, states it thus: "The weight of American authority, however, is in favor of allowing the interest as damages beyond the penalty. The penalty is the limit of liability at the time of the breach. Interest is afterwards given, not on the ground of contract, but as damages for its violation, for delay of payment after the duty to pay damages for breach of the condition to the amount of the penalty had attached,"—citing a large number of cases in support of his position. The courts of the United States also give interest in addition to the penalty where the sum secured by the bond is equal to or greater than the penalty. *United States v. Arnold*, 1 Gall. 348, per Story, J.; *Ives v. Bank*, 12 How. 159. Nor is there any distinction between the extent of the liability of the principal and that of the surety on such bonds. In most of the cases cited in Sutherland on Damages, *supra*, the surety was involved, and interest was allowed against him.

As the judgment in this case was not so great as the sum of the judgment for \$399.25, with interest thereon from April, 26, 1883, when the same was rendered, to the 10th of April, 1884, when the judgment under review was rendered; the costs in the district court and in this court; nor so large as the penalty of the bond sued on, with interest from the date of the breach of its condition, to wit, the 26th day of April, 1883, to the date of the judgment complained of,—there is no error by reason of the amount of the latter judgment, and it should be affirmed.

We concur: RISING, C.; STALLCUP, C.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the district court is affirmed.

Affirmed.

KINNEY v. WOOD.

The rule that where the evidence is conflicting, and the verdict is not manifestly against the weight of evidence, the verdict will not be disturbed on appeal, applies equally where a jury is waived and the issues of fact are tried by the court.

Error to San Miguel County Court.

THE facts are stated in the opinion.

Mr. E. MILES, for plaintiff in error.

Messrs. R. D. THOMPSON and W. H. GABBERT, for defendant in error.

RISING, C. The defendant in error brought an action in justice's court against the plaintiff in error to recover the sum of \$10 for money loaned, \$10 due for board, and \$2 for interest on said sums. Case taken to county court by appeal. Upon the trial in the county court, defendant introduced evidence to prove an indebtedness of the plaintiff to him in the sum of \$38. The case was tried to the court, and the court rendered judgment for the plaintiff for the full amount of his claim and interest.

There are many errors assigned, but counsel for plaintiff in error in his argument relies solely upon the insufficiency of the evidence to sustain the judgment, and bases his argument upon the following propositions: That the evidence shows that the plaintiff had no cause of action against defendant at the time the suit was brought; and that if plaintiff had a cause of action, the preponderance of the evidence clearly establishes a set-off, greater in

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15 297
15 451
10 270
1a 110
1a 115
1a 140
1a 170
10 270
21 489

amount than the claim of plaintiff. Upon an examination of the evidence, we think it clearly shows that the plaintiff was the owner of the claims sued on at the time suit was brought. The only evidence there is, tending to sustain the position of plaintiff in error, upon this point, is the testimony of Mrs. Wood, that, in November, 1882, she presented an order of M. A. Wood on the defendant, and the defendant said he would try to pay her a part of the account that evening; that she presented the order at another time, and defendant made no objection to it, but told her he would pay it all; that she left town about Thanksgiving, and never presented the order after that time. This evidence is wholly insufficient to show that the claims sued on were ever assigned to Mrs. Wood by the plaintiff. Aside from this, the plaintiff testified on the trial that the defendant was indebted to him on the claims sued on, and the plaintiff and Allen Wood, a witness, each testified that the plaintiff demanded payment of these claims of the defendant in December, 1882, and that defendant then promised to pay them to him.

The evidence upon the question of set-off is very conflicting, and the rule that when the evidence is conflicting and the verdict is not manifestly against the weight of evidence, the verdict will not be disturbed, must be applied in this case. In the application of this rule, in *Green v. Toney*, 7 Colo. 278, 282, it was held "that this court will only interfere where, upon the whole record, it appears that the jury acted so unreasonably in weighing testimony as to suggest a strong presumption that their minds were swayed by passion or prejudice, or that they were governed by some motive other than that of awarding impartial justice to the contending parties." A careful examination of this case fails to disclose any facts which bring it within the limitations to the application of the rule so clearly laid down by Justice Helm. Where a jury is waived, and the issues of fact are submitted to the court, upon a review of the findings of fact by this

court, the same rule must be applied as would be applied if the issues of fact had been determined by a jury. *Murphy v. Cunningham*, 1 Colo. 467, 471.

The judgment should be affirmed.

We concur: MACON, C.; STALLCUP, C.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the county court is affirmed.

Affirmed.

CHARLES V. AMOS.

1. "Suits before justices shall be commenced in the township in which the debtor resides, unless the cause of action accrued in the township in which the plaintiff resides, in which case the suit may be commenced where the cause of action accrued or is specifically made payable." Gen. St. § 1932. *Held*, that the statute does not apply to non-resident debtors.
2. An agreement between defendant and his wife, to the effect that she would assume and pay the indebtedness of defendant to plaintiff, does not release defendant where plaintiff was not a party to the agreement.
8. Defendant in an attachment suit objected to the jurisdiction of the county court, on the grounds that the justice, before whom the case was first tried, did not cause notice of the suit to be published as required by law; and that the constable did not retain the summons put into his hands for serving until the date of the trial. *Held*, that by filing his appeal bond in the appellate court, the defendant waived objection to the jurisdiction of that court.

Appeal from Jefferson County Court.

ON November 19, 1883, Amos brought suit against Charles before a justice of the peace of Jefferson county, and on the same day a summons was issued by said justice, which on the 23d day of the same month was returned by the constable with the indorsement thereon, "Defendant not found." At the same time, Amos filed an affidavit in attachment before the justice of the peace,

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alleging, among other grounds, the non-residence of Charles in Colorado, upon which a writ of attachment was issued, and on the 23d day of November one Charles Lemsky was attached as garnishee. On November 28th, Lemsky appeared before the justice of the peace, and answered as garnishee, admitting his indebtedness to Charles in the sum of \$200, whereupon the justice continued the cause until the 8th day of December, on which last date (the defendant not appearing) he rendered judgment against Charles for \$80 and costs of suit; and against Lemsky, as garnishee, for \$200. During the continuance of the cause from November 28th to December 8th, no notice was posted as required by section 2019, General Statutes. From this judgment Charles appealed to the county court of Jefferson county.

There was no written pleadings in the case in either court, but before the trial of the cause in the county court, and on the 23d day of January, 1884, counsel for defendant, Charles, moved to dismiss the cause upon the following grounds: "*First*. The justice of the peace who rendered the judgment in the above-entitled action had no jurisdiction of the defendant or of the cause of action. *Second*. This court has not jurisdiction to try this case on appeal, and to enter up judgment against the defendant. *Third*. The defendant did not at any time reside in the township or precinct wherein the suit was commenced, nor did the cause of action accrue in that township, nor was the same made payable there. *Fourth*. There was no summons in this action ever served on the defendant. *Fifth*. The defendant resided in the precinct of Morrison, where the cause of action accrued, and at the time of the commencement of this action, and long before." Which motion was overruled, and defendant duly excepted. The cause was then set for trial by the court, against the plaintiff's consent.

Upon the trial of the action, after the plaintiff had rested his case, defendant moved for a nonsuit upon the

following grounds: "*First*. That the plaintiff had failed to show that the court had jurisdiction either of the cause of action, or of the defendant, or of his property. *Second*. It has not been shown that the defendant resides in the township or precinct in which suit was commenced, nor that the cause of action accrued in the township where the plaintiff resides, or that the cause of action was specifically made payable in the township where the suit was commenced; but, on the contrary, the evidence shows that the cause of action accrued in the township of Morrison, where the plaintiff and defendant both resided at the time, and in a different precinct from that where the suit was commenced. *Third*. The plaintiff has failed to show that the defendant had been served with summons, but, on the contrary, the return of the constable shows that no service was had on defendant. *Fourth*. There was no property attached under the writ of attachment, nor was there a copy of the writ served upon the defendant, or any other person, but the return of the constable indorsed on the writ shows that there was 'no property found.' *Fifth*. It has not been shown, either by the transcript of the justice of the peace or otherwise, that any affidavit had ever been made and presented to the justice that the defendant resides without the state of Colorado, and cannot be found therein, so that personal service of process cannot be had on him, or that he conceals himself, or that he stands in defiance of the officer with intent to prevent service of process upon him. *Sixth*. It has not been shown that the justice of the peace who rendered judgment in this case against the defendant, ever made an order of publication, or caused notice of the attachment to be published by posting three notices of the levy of said attachment, or of the day and hour at which the trial of the cause would be had at his office, or that any such notices were ever posted for ten days, or any other time prior to the day of trial. *Seventh*. That the constable did not retain the

summons until the day of trial, but returned the same and it was filed with the justice of the peace on the 28th day of November, 1883." Which motion was also overruled, and defendant excepted. Defendant then offered testimony, and the court rendered judgment against the defendant in the sum of \$80, and costs, from which defendant appealed.

Mr. JOSEPH MANN, for appellant.

Mr. A. H. DE FRANCE, for appellee.

MACON, C. Appellant assigns thirteen errors in this case. The second assignment goes to the alleged admission of improper testimony for the plaintiff. The record fails to show that any improper testimony was admitted by the court. All of plaintiff's testimony was proper, relevant and material, provided the court had jurisdiction of the cause.

The third assignment is based upon the refusal of the court to permit the witness to testify what were Charles' intentions in leaving Morrison. Charles' intentions in the premises were immaterial, and, whatever they may have been, they could not affect the case. The evidence was offered for the purpose of showing that Charles was not a non-resident of this state when the attachment was issued; but if one man could be allowed to testify to the intentions of another, instead of being confined to a statement of facts or declarations from which intent may be inferred, this offer of defendant should not have been allowed, because Charles' intent when he left Morrison could not prove what his intent was when the writ of attachment was issued. His letter to Amos, from Goshen, N. C., dated December 3, 1883, shows beyond dispute that he had given up all expectation of returning to Colorado.

The fifth assignment has no merit; it is: "The court erred in striking out the testimony of L. E. Charles and

Charles Lemsky, witnesses, wherein they state that they know Mr. Charles is coming back to Morrison." Suppose it be admitted that Charles did contemplate returning to Morrison. These witnesses did not pretend to know or say what his object in returning was; they did not even intimate that he meant to reside in that or any other place in Colorado upon his return. The witness Mrs. Charles says: "I know Mr. Charles is coming back again to Morrison. I was well acquainted with Mr. Charles' business up to the time he left." She does not pretend to say he was coming back to reside there; and on cross-examination says her knowledge of this fact is derived from what he told her before he went away and from his letters. Her pretended knowledge was but her conclusion from the declarations of Charles, the defendant, and were not proper testimony. Lemsky's knowledge is not better founded, and the court did right in striking it out.

The sixth assignment is: "The court erred in rejecting other proper testimony on the part of defendant;" and upon that it is sufficient to say that the record shows no error of the court in this particular.

The eighth, ninth, tenth, eleventh, twelfth and thirteenth assignments all go to the same point, namely, that upon the evidence the judgment should have been for defendant instead of for the plaintiff. Assuming the jurisdiction of the court, there can be no pretense that defendant was entitled to judgment; upon the whole evidence, there can be no doubt of the fact of his indebtedness to plaintiff, and his letter of December 3d, to Amos, is a clear admission of such indebtedness; the only excuse for not paying it being that "what I once called my wife agreed before more than a dozen witnesses to assume all indebtedness against the shop." With this agreement Amos had no connection, and by it he was not bound. It was, therefore, no defense to the action, and the court did not err in rendering judgment against defendant upon the evidence.

The first, fourth and seventh assignments challenge the jurisdiction of the justice of the peace to render the judgment appealed from, as well as the jurisdiction of the county court. This objection to the jurisdiction rests upon three grounds: *First*, that the defendant did not at the commencement of the suit, nor at any time, reside in the township where the suit was commenced; *second*, that the justice did not cause notice of the suit to be published as required by law; and, *third*, that the constable did not retain the summons put into his hands for service until the date of the trial of the cause. The first ground has been disposed of by this court in *Wagner v. Hallack*, 3 Colo. 182, where it is held that the statute in question does not apply to non-resident debtors. The second and third grounds relied on by appellant have also been before this court, and disposed of adversely to the view advanced by appellant. In *Wyatt v. Freeman*, 4 Colo. 14, it is held that by filing his appeal bond in the appellate court, appellant enters his appearance therein, and cite with approval *Swingley v. Haynes*, 22 Ill. 216, and *Railroad Co. v. McCutchin*, 27 Ill. 11, in which cases it is held that, though the justice had no jurisdiction of the person of the appellant, by appealing and filing his appeal bond he brings himself within the jurisdiction of the appellate court. The Illinois statute, which these cases construe, is substantially, in terms and meaning, identical with sections 64 and 65 of our justice and constable act.

There was no error in the proceedings of the county court, and the judgment should be affirmed.

We concur: STALLCUP, C.; RISING, C.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the county court is affirmed.

Affirmed.

HUNT V. HAYT.

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22	246
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9a	25
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25	287
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d13a	355
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17a	14
10	278
d19a	152
19a	167

1. The defense of the statute of limitations may not be raised upon the general allegation that the complaint does not state facts sufficient to constitute a cause of action. Such defense is in the nature of a special privilege and must be pleaded specially, whether the pleading be by demurrer or answer.
2. Where it does not appear, upon the face of the complaint, that a proposition to convey land was not in writing, the objection should be raised by answer.
3. Part performance of a parol agreement, for the conveyance of land, is sufficient to authorize courts of equity to compel specific performance of the agreement.
4. The most important acts, which constitute a sufficient part performance to authorize courts of equity to decree specific performance, are actual possession and the making of permanent and valuable improvements.
5. Such equitable interest may be assigned by the vendee, or party who stands in an analogous position, and the assignee may maintain an action to compel a specific performance of the contract.
6. It is not error to require payment of the penalty adjudged upon overruling a demurrer, under section 57 of the code.

Appeal from District Court, Huerfano County.

THE complaint alleges that on or about July 9, 1878, the defendant was the owner of a body of unimproved and unoccupied land near to and adjoining the town of Alamosa, in Conejos county; that he was anxious to make said land valuable, and bring it into market for speedy sales, and to that end proposed to one A. C. Rupe that if he would cause to be built a good house and other surrounding improvements on a certain definitely described portion and parcel of said land, he would deed the said portion and parcel of said land to Wilhelmine F. Rupe, the wife of said A. C. Rupe; that said A. C. Rupe and Wilhelmine F. Rupe, relying upon the promises of the defendant, caused to be built upon said described premises a large and comfortable dwelling-house, a stable and suitable out-houses, and expended in the improvements of said premises the sum of \$6,500; that defendant on

the 9th day of July, 1878, made, executed and delivered to said Wilhelmine F. Rupe a warranty deed to certain definitely described premises; that at the time said deed was so made, executed and delivered, the defendant and the said A. C. Rupe, and the said Wilhelmine F. Rupe, each supposed that it fully and perfectly described the premises upon which said improvements had been made, and that it conveyed the title to the premises so improved that said premises were occupied and possessed by said A. C. Rupe, his wife and family, from July, 1878, until the same were delivered by them to the plaintiff; that in August, 1882, it was discovered by said A. C. Rupe and his wife that said deed made by defendant to said Wilhelmine F. Rupe did not describe and include all of the said premises upon which the said improvements were placed, and they demanded of said defendant a deed for all the ground so occupied and improved by them, which deed the defendant refused to make; that thereupon the said A. C. Rupe and the said Wilhelmine F. Rupe threatened to move their said houses and all their said improvements off said premises, and that defendant fearing that they would do so, and believing that if said house and improvements were taken away it would injure the sale of the balance of his said property, went to one Charles D. Hayt, the husband of the plaintiff, who was acting as the agent and attorney of the said Wilhelmine F. Rupe, and said to him that he would not make a deed of the premises to the said A. C. Rupe or to Wilhelmine F. Rupe; that he did not want the house removed away, for it would injure the balance of his land, and if the said Hayt or any of his friends would buy Rupe out he would make a good title to the premises to the purchaser; that plaintiff, relying upon the said promises of the defendant, on September 1, 1882, through her said husband, Charles D. Hayt, acting as her agent, purchased said premises of the said Wilhelmine F. Rupe, and entered into the immediate

possession and occupancy thereof; that plaintiff paid for said premises the sum of \$2,000, and has spent in improving the same the sum of \$700, and that plaintiff and her family have occupied said premises from the said September 1, 1882, and are still occupying the same; that on the 11th day of April, 1883, the plaintiff received a quitclaim deed from said A. C. Rupe and Wilhelmine F. Rupe for all their interest in said premises; that plaintiff and her grantors have paid all the taxes and assessments assessed against said premises for the years 1879, 1880, 1881, 1882 and 1883; that plaintiff has requested defendant to make her a deed to said premises, and perfect her title thereto, and that he has refused and still refuses so to do.

Prays judgment: (1) That the absolute title to the said premises be adjudged and decreed to be in plaintiff. (2) That defendant be decreed to make to the plaintiff a good and sufficient deed to said premises by a short day to be fixed by the court. (3) For general relief.

Defendant demurred to the complaint upon the following grounds: (1) That said complaint does not state facts sufficient to constitute a cause of action. (2) That said complaint is ambiguous, unintelligible and uncertain. Demurrer overruled, and \$5 costs taxed against defendant on account of said demurrer. Defendant elected to stand upon his demurrer.

Upon a hearing of the cause, decree entered that plaintiff is entitled to have a title from defendant for the said premises, and that defendant, within sixty days from the date of said decree, convey by a sufficient deed of conveyance all his right, title and interest in and to the premises first definitely described and set out in said complaint. Defendant duly excepted to all the rulings of the court, and to the entry of the decree.

Mr. L. B. FRANCE, for appellant.

Messrs. BLACKBURN and DALE, for appellee.

RISING, C. The errors assigned are based upon the ruling of the court on the demurrer, and upon the action of the court in imposing costs upon the defendant upon overruling his demurrer.

The argument of counsel for appellant, upon the first ground of the demurrer, is that the statement of facts in the complaint shows the alleged contract to be within the statute of frauds, and that the action was not brought within the time limited by statute, and that each of these objections is fatal on demurrer, upon the ground that the complaint does not state facts sufficient to constitute a cause of action. The objection that the action is barred by the statute is not raised by the demurrer. This defense is in the nature of a special privilege, and must be pleaded specially, whether the pleading be by demurrer or answer. *Hexter v. Clifford*, 5 Colo. 168-173.

It does not appear upon the face of the complaint that the proposition made by Hunt to Rupe was not in writing, and, therefore, as to the allegations relating to the transactions between Hunt and A. C. Rupe and Wilhelmine F. Rupe, the complaint is sufficient. The question should have been raised by answer, if raised at all. *Tucker v. Edwards*, 7 Colo. 209; Bliss, Code Pl. 312, and cases cited. But, even if it appeared upon the face of the complaint that the proposition was not in writing, then the averments of the complaint relating to the transaction between Hunt and Wilhelmine F. Rupe, showing an acceptance of and compliance with the terms of the proposition made by Hunt to her, are sufficient to bring the case within the provisions of section 1519 of the General Statutes, which provides that "nothing contained in chapter 43 of 'Frauds and Perjuries' shall be construed to abridge the powers of courts of equity to compel the specific performance of agreements, in cases of part performance of such agreements." The complaint alleges, not only a part performance, but a full and complete performance, by Wilhelmine F. Rupe, of all the conditions the perform-

ance of which was required of her by the proposition made by Hunt, to entitle her to a deed to the premises so improved by her, and also shows an attempted performance of said agreement on the part of said Hunt. Such performance of a parol agreement for the conveyance of land is sufficient to authorize courts of equity to compel specific performance of the agreement.

The most important acts which constitute a sufficient part performance to authorize courts of equity to decree specific performance are actual possession, and the making of permanent and valuable improvements. Pom. Eq. Jur. § 1409; Story, Eq. Jur. § 761; *Davenport v. Mason*, 15 Mass. 92; *Freeman v. Freeman*, 43 N. Y. 34; *Laird v. Allen*, 82 Ill. 43; *Jamison v. Dimock*, 95 Pa. St. 52; *Lamb v. Hinman*, 46 Mich. 112; 6 N. W. Rep. 675, and 8 N. W. Rep. 709; *Littlefield v. Littlefield*, 51 Wis. 25; 7 N. W. Rep. 773. By virtue of the possession taken of the premises, and the improvements placed thereon by Wilhelmine F. Rupe under the proposition made by Hunt, and in performance of the conditions contained in said proposition, Mrs. Rupe became the equitable owner of said premises. Pom. Eq. Jur. § 368.

Such equitable interest may be assigned by the vendee or party who stands in the position analogous to that of the vendee, and the assignee may maintain an action to compel a specific performance of the contract. Pom. Spec. Perf. § 487; Wat. Spec. Perf. § 68; *House v. Dexter*, 9 Mich. 246. The quitclaim deed from Mrs. Rupe to the plaintiff conveyed by assignment the equitable right of Mrs. Rupe in the premises, and all her rights under the contract with Hunt. *Miller v. Whittier*, 32 Me. 203; *Currier v. Howard*, 14 Gray, 511; *Bradbury v. Davis*, 5 Colo. 265, 269; *Fitzhugh v. Smith*, 62 Ill. 486. In the case last cited it held that the effect of a deed is made to depend rather upon the intention of the parties than upon the form of the deed.

It must be assumed upon this appeal that the allega-

tions of the complaint necessary to authorize the decree entered were sustained by proofs upon the hearing. The complaint alleges an agreement by Hunt to convey to Wilhelmine F. Rupe certain definitely described premises, upon condition that she make certain improvements on said premises; alleges the full and complete performance of such condition by Mrs. Rupe; alleges that Mrs. Rupe conveyed all her interest in said premises to the plaintiff before the bringing of this action; alleges that defendant has not conveyed said premises to Mrs. Rupe, nor to the plaintiff, although requested so to do by Mrs. Rupe before her conveyance to the plaintiff, and by the plaintiff since such conveyance to her. These allegations constitute a cause of action against the defendant, and are sufficient to sustain the decree entered.

From a careful examination of the complaint, we come to the conclusion that the second ground of demurrer is not well taken. *Gilpin Co. v. Drake*, 8 Colo. 586, 591.

The objection to the action of the court in imposing \$5 costs against defendant upon overruling his demurrer is not well taken. The payment of this sum by defendant was adjudged under the provisions of section 57 of the code. The validity of the statute authorizing this action of the court is questioned by counsel for appellant. The validity of the statute was sustained in *Chivington v. Colorado Springs Co.* 9 Colo. 597.

The judgment should be affirmed.

We concur: MACON, C.; STALLCUP, C.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the district court is affirmed.

Affirmed.

BRASHER V. CHRISTOPHE.

A reservation to the mortgagor of chattels of the right to sell the mortgaged property renders such mortgage void *ab initio* as to creditors and incumbrancers.

Error to District Court, Arapahoe County.

THE facts are stated in the opinion.

Mr. H. C. DILLON, for plaintiff in error.

Messrs. BROWNE and PUTNAM, for defendant in error.

MACON, C. The facts of this case are: In February, 1880, Christophe was keeping a boarding-house or tavern called the "Balcom House," in Denver, holding a lease on the premises from Hallack Bros., and on the 19th of that month assigned said lease, and sold the furniture in the house to James Bell and Alexander Lewis, for \$2,500, \$1,500 of which was paid down, and the notes of Bell and Lewis for \$1,000 were given, to secure which, the latter executed to Christophe a chattel mortgage upon the same furniture they had bought of him, in which they reserved the power to sell and dispose of the mortgaged property in this form: "It is expressly understood and agreed by the party of the second part that the parties of the first part shall have the privilege of disposing of such furniture and chattels conveyed by this chattel mortgage as they shall see fit, for the purpose of purchasing other and better furniture and fittings to put in the aforesaid premises." Afterwards, and before the maturity of any of the notes given to Christophe, Bell and Lewis executed four other chattel mortgages, the first to Brasher Bros., the second to Richmond Bros. & Farnsworth, the third to Richmond & Farnsworth, and the fourth to Fishel, Kohn & Wise, to secure an indebtedness in the aggregate to these several firms of about \$3,600. Soon after the 19th of February, and before any

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of the last four mentioned mortgages were executed, Bell and Lewis had sold a large part of the furniture bought of Christophe and included in his mortgage, and replaced it with other articles of furniture, but how much in value, and what particular articles of the old furniture remained in the house when the last four mortgages, or any of them, were executed, is not shown with any degree of certainty; though the jury on the trial found as a fact that on the 5th of May, 1881, there remained in the house of such old furniture about \$1,000 in value. On the 5th of May, 1881, the mortgagees, in the last four mortgages, foreclosed them by seizing and selling the property described therein, leaving nothing for Christophe. For this Christophe brought an action of trover against Brasher Bros. and Bell and Lewis. In this complaint is set out the mortgage in its legal effect, and also the property described therein; the fact of taking and conversion by the defendants, and the value of the property. The record shows that, to the original complaint, Bell and Lewis filed a demurrer, and that afterwards an amended complaint was filed, after which Bell and Lewis made no further defense, and the case went against them by default. Brasher Bros. filed their answer, denying the validity of the alleged mortgage to Christophe; denied the identity of the goods described in the complaint with those mortgaged in the last four mortgages; and admitted the seizure and conversion of all the property, furniture and fittings in the said Balcom House, then called and known as "The Turf Exchange."

The pleadings present two issues: *First*, the validity of the alleged mortgage to Christophe; and, *second*, the identity of the chattels described in the alleged mortgage to Christophe with those taken and converted by Brasher Bros. The case was tried to a jury, who rendered a verdict for plaintiffs in the sum of \$1,334. Defendants moved for a new trial on the ground of error in law in the trial; that the verdict was contrary to the law and

evidence; because the damages awarded by the jury were excessive; because of newly-discovered evidence since the trial, and for that the court erred in entering judgment on the verdict, pending notice of a motion for a new trial. This motion was overruled, to which defendants excepted, and prayed an appeal, which was denied by the court, and to which an exception was reserved. Defendants are in this court on a writ of error, and have assigned twelve errors as ground for reversal of the judgment below, but abandoned the twelfth assignment. In the trial, Christophe introduced his mortgage in evidence over the objection of defendants, and defendants offered the last four mortgages, which the court admitted, but limited their effect as evidence, and required defendants to show that they were executed to secure money due for better furniture and fittings for this Turf Exchange, holding that for any other purpose the mortgages should be deferred to that of the plaintiff. On the conclusion of the evidence, the court instructed the jury as follows:

“*Gentlemen of the Jury:* The first, and substantial, and material issue in this case for you to determine from the evidence, is whether the defendants, commonly spoken of as Brasher Bros., being B. P. Brasher and L. B. Brasher, wrongfully took and converted to their own use certain property mentioned in the plaintiff's amended complaint, and which is referred to in this chattel mortgage, and contained in this schedule, and if you shall find that they did, then to find the value of such goods and chattels which you shall find they wrongfully converted. The case, to a certain extent, so far as the documentary portion here and the legality of these documents is concerned, is uncontradicted. On the 19th of February, 1881, it appears in evidence, without contradiction, that the plaintiff made a sale of certain goods and chattels in the Balcom House, in this city, to Bell and Lewis, for a certain sum in cash, and took a mortgage back for

the sum of \$1,000, three notes amounting in the aggregate to \$1,000; and the mortgage upon the goods and chattels in said Balcom House to secure the payment of those notes. In that chattel mortgage is contained this clause: 'It is expressly understood and agreed by the party of the second part' (that is the plaintiff, Seraphin Christophe) 'that the parties of the first part' (this is Bell and Lewis) 'shall have the privilege of disposing of such furniture and chattels, conveyed by this chattel mortgage, as they shall see fit, for the purpose of purchasing other and better furniture and fittings to put in the aforesaid premises.' It further appears that subsequently, and before the maturity of any of these notes, Bell and Lewis gave four other certain chattel mortgages to secure claims held against them by Brasher Bros., by Richmond & Farnsworth, by Richmond Bros. & Farnsworth, and by Fishel, Kohn & Wise, and gave a mortgage on certain other property of the defendants, Bell and Lewis, said property in those four other certain mortgages being described as being in the same house; and it is for you to say, from the evidence, whether the property described in those four other certain mortgages, given by Bell and Lewis, is the same identical property as the property described in the plaintiff's mortgage from Bell and Lewis. As to that you must depend on the evidence for your guidance, and not necessarily upon the fact that the property may be described in the same language or the same general terms. As to the identity, then, of the property described in the first mortgage, and in these four other certain mortgages, you are to determine from the evidence whether it is the same property. If you shall find that it is the same property, or that any portion of it is the same property, then the court charges you, as a matter of law under this case, under the evidence in this case, that the security of these four parties, or four partnerships, by their four chattel mortgages, is not good against the first mortgage, unless these four

mortgages, or some one or more of them, was given for the purpose of purchasing other and better furniture and fittings to put in the aforesaid premises. The plaintiff gave to the defendants, Bell and Lewis, the privilege of disposing of the property as they should see fit; and the court holds that they might mortgage it, if the purpose of their mortgaging it was to secure other and better furniture and fixtures to put in the same hotel; but it could not be mortgaged for any other purpose; that is, the same property described in the plaintiff's mortgage could not be mortgaged for any other purpose than for the express purpose specified here, and be a good mortgage to defeat the first mortgage; but, if mortgaged for the purpose of getting other furniture and fittings for that hotel, for that express purpose in good faith, then the second mortgagee's security would prevail over the first mortgagee's security, if you shall find that fact from the evidence.

“Now, it further appears from the evidence, without contradiction, that some time about the 1st of May, 1881, the defendants the Brasher Bros., acting in concert with the other mortgagees under these subsequent mortgages, went and took possession of certain property in the Balcom House, which has been since known as ‘The Turf Exchange,’ as appears from the evidence under their several mortgages, and sold and disposed of the property which they took possession of. But it is for you to say from the evidence whether in taking possession of certain property in the Balcom House, or Turf Exchange, whether or not they took possession of any of the property which the plaintiff had a mortgage upon; the plaintiff in this respect must satisfy you by a preponderance of the evidence that these defendants, in concert with others who had mortgages, did take the property mentioned in the plaintiff's chattel mortgage, or some portion of it, before the plaintiff is entitled to recover; and then, if you shall find that the defendants did take possession, and caused to be sold and converted to their own use,

any property described and mentioned in the plaintiff's chattel mortgage, then the defendants are liable for the value of so much as they took, unless the defendants shall have satisfied you by a preponderance of the evidence that their mortgage was given for that property, because it was taken in order to enable Bell and Lewis to purchase other and better fittings for the hotel; and if the defendants shall have satisfied you that notwithstanding you may believe from the evidence that they took certain property that was in the plaintiff's mortgage,—if they shall have satisfied you by a preponderance of the evidence that these mortgages were taken in good faith for the purpose of enabling Bell and Lewis to better furnish and fix up the Balcom House, then the defendants are not liable. So the liability of the defendants depends upon two substantive propositions, and you must find upon those two in order to warrant you in finding a verdict for plaintiff. *First*, you must find by a preponderance of the evidence that they took property which the plaintiff had a valid mortgage upon, and converted it to their own use; and, *second*, that in so taking it they took it under mortgages which were not valid, because they were not taken under the power which the plaintiff gave Bell and Lewis to dispose of the property to secure other and better furniture and fittings for fitting up the hotel. Upon the first proposition, that they took property secured by the chattel mortgage, the burden of proof is upon plaintiff, but in respect to the second proposition, that these mortgages were executed for the purpose of enabling Bell and Lewis to purchase other and better fittings, the burden of proof is upon the defendants. Now, there was no objection to Brasher Bros. and these subsequent mortgagees acting in concert by one agent if their mortgages were *bona fide* and valid, and they had a right, each of them, to foreclose their mortgages at one and the same time, and by one and the same agent, and nothing is to be adjudged against them on

that account. Their liability, if there be any liability at all, depends upon the ground that they have wrongfully taken certain property that the plaintiff had a chattel mortgage upon and converted it to their own use, without having brought themselves within the provisions of this mortgage; that is, of getting chattel mortgages which would supersede the plaintiff's chattel mortgage for the purpose of enabling Bell and Lewis to purchase other and better fixtures and furniture for the said hotel. You must identify this property for the one purpose or the other, as indicated by my charge, and as indicated by the evidence, as best you can to determine the controversy.

“The measure of the plaintiff's recovery must in no event exceed the sum of \$1,000, with interest thereon from February 19, 1881; but, even though the plaintiff should recover, he is not necessarily entitled to recover that amount, unless the value of the property, which the defendants shall be held or found to have wrongfully converted, would amount to that sum. You are the judges of the weight of the evidence and of the credibility of the several witnesses, and from all the testimony and facts and circumstances of the case, appearing at the trial, fairly considered and weighed, you are to arrive at the truth of this matter, and found your verdict upon it under the rule of law given to you by the court. The court instructs the jury that the plaintiff having averred a demand in his complaint and the defendant having denied it, to entitle the plaintiff to recover you must find that the plaintiff demanded the return of those goods from the Brasher Bros. If you find for plaintiff against the defendants B. P. and L. B. Brasher, the form of your verdict should be as follows, viz.: We, the jury, find the issues here joined between the plaintiff and defendants B. P. and L. B. Brasher for the plaintiff, and we assess the plaintiff's damages by occasion of the premises in his complaint specified against said defendants at the sum of ____.”

The defendants prayed the following instructions:

“The jury are instructed that the plaintiff in this case claims damages against the defendants Brasher Bros., because he says that they seized, took into their possession, and sold certain goods and chattels upon which he claims to have had a lien as a chattel mortgage. If you believe from the evidence that the defendants Brasher Bros. did not convert to their own use, or sell any of the goods and chattels covered by the plaintiff's chattel mortgage, your verdict will, of course, be for the defendants. If, however, you should believe from the evidence that the said Brasher Bros., acting in conjunction with Richmond Bros. & Farnsworth, Richmond & Farnsworth, and Fishel, Kohn & Wise, did seize, take into their possession, and sell some of the goods and chattels described in plaintiff's chattel mortgage, and that the value of the goods and chattels so taken and sold did not exceed the amount of the indebtedness then due and owing from the defendants Bell and Lewis to the said Richmond & Farnsworth, Richmond Bros. & Farnsworth, Fishel, Kohn & Wise, and Brasher Bros., you should in like manner find in favor of the said Brasher Bros.

“The court instructs the jury that a chattel mortgage of personal property where the mortgagor, as in this case, is allowed to continue in possession of the property, and sell and dispose of the same, is in law fraudulent and void as against the creditors of the mortgagor, as well as against subsequent purchasers and incumbrancers of the same. Inasmuch, therefore, as the plaintiff's said chattel mortgage permitted the said Bell and Lewis to remain in possession of the mortgaged chattels, and to sell and dispose of the same, the plaintiff is not entitled to recover anything from the said Brasher Bros. as for a wrongful conversion of any such goods and chattels, even though they should believe from the evidence that the said Bell and Lewis did sell, mortgage or otherwise dispose of some of the said goods and chattels to the said

Brasher Bros. or any other person or persons whatsoever.

“The jury are further instructed that the burden of proof in this case is upon the plaintiff, and it is for him to prove his case by a preponderance of the evidence. If the jury, therefore, find that the evidence in this case preponderates in favor of the defendants, then the plaintiff cannot recover, and the jury should find for the defendants.

“The jury are further instructed that the defendants cannot be held liable for a conversion of any of the goods and chattels in controversy in this case without a definite demand by the mortgagee, and a definite refusal to surrender them. If, therefore, you believe from the evidence that the plaintiff did not make a definite demand upon the said Brasher Bros. for a return of the said goods and chattels, or that they did not make a definite refusal to surrender them, your verdict should be in their favor.”

This the court refused to give, but indorsed thereon, “Given in substance.”

Of the eleven assignments of error relied on by plaintiffs in error, it is unnecessary to notice more than one,—the second, which attacks the validity of the Christophe mortgage, as against Brasher Bros.; for upon the correctness of the construction of that mortgage, by the district court, the validity of this judgment depends. In fact, all the other assignments, except the first and fourth, are but different statements of the point made in the second. If the Christophe mortgage was valid against plaintiffs in error, there is no error in the judgment and proceedings of the court below; if not, then the judgment in this case must be reversed. It cannot be denied that the rulings of the courts of the several states as to the validity of a mortgage, reserving the right to the mortgagor to sell and dispose of the property mortgaged for his own use, have been various and conflicting. But it

seems that in this state the ruling upon that question has been uniform, and the doctrine is settled here. In *Bank v. Goodrich*, 3 Colo. 141, the mortgage covered a stock of clothing, and by its terms the mortgagor was permitted to retain, use and enjoy the property. The only use to which such property could be put was to sell it, which he did, with the knowledge of the mortgagee; and the court, in a unanimous opinion, held the mortgage void as against the creditors of the mortgagor. In *Wilcox v. Jackson*, 7 Colo. 521, it does not appear whether the mortgage provided for a retention and use of the property mortgaged, but as a matter of fact, the mortgagors did retain the possession, and sold the goods for their own benefit with the knowledge and consent of the mortgagee. In that case it was held that the leaving of the goods in the possession of the mortgagors and permitting them to sell the same for their own benefit was fatal to the validity of the mortgage. Still later, in the case of *Wilson v. Voight*, 9 Colo. 614, where the mortgage provided that the mortgagor, Voight, should retain, use and enjoy the mortgaged property, this court held the mortgage void. Helm, J., in speaking for the court, used the following language: "The instrument contained a provision authorizing the mortgagor, until default, to retain the possession, use and enjoyment of the property mortgaged. It is difficult to understand how the mortgagor could use and enjoy a stock of merchandise without selling or disposing of the same. But we shall assume that the instrument contains no language affecting its validity. The testimony of the mortgagee himself establishes the following facts, viz.: That after the mortgage was executed and delivered, the mortgagor continued to sell and dispose of goods from the stock included, in the ordinary and regular course of trade; that he applied none of the proceeds from such sales to the payment of the notes secured by the mortgage, but retained the same for his own use and benefit; and that these things were done with

the full knowledge and consent of the mortgagee. This sale of goods and disposition of the proceeds with the mortgagee's consent were acts wholly at variance with the idea of *security*, fundamental to such transaction,—acts which were inconsistent with the purposes of chattel mortgage statutes, and stamped upon the entire transaction a brand of bad faith, difficult of satisfactory explanation. * * * Predicated upon these considerations is the view sustained, as we think, by the larger number and better reasoned cases, viz.: That the *existence* of the facts mentioned, whether shown by the mortgage or by evidence *aliunde*, wholly invalidates the transaction as to creditors. The position that the motive of the mortgagor and mortgagee should, under such circumstances as those before us, remain a question of fact to be determined by the jury upon all the evidence, is taken in able and ingenious opinions; but when carefully analyzed, it will be found that these opinions are based more upon consideration of probable hardship and inconvenience in individual cases, than upon solid principles of law, or broad and intelligent grounds of public policy."

Here the mortgage permits the mortgaged chattels to be converted into money, for the sole use and benefit of the mortgagors, nor is the effect of the mortgage in any way altered or changed by the fact that the mortgagors are required to re-invest the funds arising from the sale of the chattels in other furniture to be put in the house. Had the mortgage contained an express provision declaring that the newly-acquired property should be covered thereby, it is doubtful if the legal effect would have been changed. But we do not pass upon this question; it is enough to say that if such intention existed it is not sufficiently expressed. Upon the new-acquired property the mortgagee had no lien or security; it became the absolute property of the mortgagors, liable to seizure upon attachment, or execution by other general creditors, or to be incumbered to such creditors by chattel mortgage.

The district court seems to have supposed that because the mortgagors were bound by the terms of the instrument to re-invest the proceeds of the old furniture in new, so long as the old remained unsold, Christophe had 'a lien upon it. This view is plausible, but not sound. The very question came up for adjudication in *Wilson v. Voight*, *supra*, and was decided adversely to the view assumed by the district court. It is there said: "The fact that other property besides merchandise was included in the mortgage does not affect the result. There are cases which hold that such an instrument may be void in part, and in part valid. * * * But we are inclined to accept and apply the doctrine elsewhere announced, that, if the mortgage be void as to a portion of the property mentioned therein, it is void altogether. It is the *agreement to sell*, retaining the proceeds, or the act of selling with the mortgagee's consent, and retention of the proceeds, that invalidates the transaction. Whether this agreement or this act relate to one part of the property mortgaged or another it is a matter of little significance. In a case like the one at bar, where there is no express agreement, why should the mortgage be held good as to fixtures, but void as to the goods remaining unsold? It may be that no more goods would have been disposed of. And it may be that had things remained *in statu quo*, and Voight returned, he would have proceeded to sell the fixtures. If, under a contract providing for the sale of merchandise, the mortgage may remain valid as to fixtures and other property, it should follow that when the contract related to a particular line of goods, or a particular part of the stock, the mortgage would remain unsailable as to the rest of the wares or commodities. The welfare of all parties interested will, we think, be best subserved by holding the mortgagee to a strict degree of care in seeing to it that the transaction is not tainted with this objectionable feature. There will, in our judgment, be less confusion, and in the end less real injustice,

by adhering to the rule that if the mortgage is upon this ground void in part, it is wholly void."

The agreement to sell invalidates the mortgage as to creditors and incumbrancers, and this effect takes place at the moment of the delivery of the instrument. It is not necessary to this effect that any of the property be sold under the power. The transaction is vitiated *ab initio* as to all the property upon which it is attempted to create a lien, by the reservation of such right, and not by the exercise of it. Every objection which can be conceived against a chattel mortgage, like those in the cases cited, will apply to this one. The provision that the chattels may be sold for a designated purpose only, does not help the mortgagee, when if the purpose is executed he is bereft of all security. In this case, the more speedily Bell and Lewis executed this power to sell according to its terms, the more completely was Christophe deprived of his security. The transaction has every feature and element of an incumbrance made for the purpose of defrauding creditors. If the construction adopted by the district court were correct, then Bell and Lewis could have held this property until one day before the maturity of their debt to Christophe, protected from execution or attachment at the suit of other creditors, and then have sold it, applied the proceeds to their own use, and if such other creditors should have been fortunate enough to find other property upon which to levy attachments, they might have been compelled to prorate with Christophe. Whatever the motives of the parties to such a transaction may be, viewed as a moral question in the business of every-day life, its effects are injurious, and in law and equity such agreements are fraudulent *per se* as against creditors and subsequent incumbrancers.

It follows, therefore, that the judgment must be reversed and the case remanded, with directions to proceed according to the views expressed in this opinion.

We concur: STALLCUP, C.; RISING, C.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the district court is reversed and the cause remanded for a new trial.

Reversed.

DALLAS V. REDMAN.

Section 21 of article V of the state constitution, prescribing that a bill shall contain but one subject, which shall be clearly expressed in the title, must receive a reasonable interpretation, and whenever a matter contained in the statute may fairly be considered germane to the subject expressed by the title it is sufficient.

Error to District Court, Saguache County.

THIS was an action brought by Mrs. Dallas against G. A. Gibbs, upon a promissory note, for balance due thereon of about \$1,500. A writ of attachment was duly issued in the case and certain real estate and personal property seized thereunder; whereupon Mrs. Redman, the defendant in error, claiming to be the owner of said real and personal property, came and filed her plea of intervention in the case, setting forth that she was the owner and lawfully seized and possessed of said property, which had been seized under the writ; to which pleading the plaintiff filed a motion to strike from the files, as follows: "(1) Because there is no law of this state authorizing any such paper to be filed in such case. (2) Because the pretended law under which such paper purported to have been filed is in conflict with the constitution of this state."

The court denied the motion and ruled the plaintiff to plead to the petition of the intervenor; whereupon the plaintiff answered the same, denying the allegations thereof, together with some affirmative allegations, to which there was a replication; so that the issues between the plaintiff and the intervenor were made up, and the

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14	404
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17	250
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2a	461
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21	268
22	526
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26	361
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35	505

same were tried to a jury. The verdict was for the intervenor, the defendant in error here, that she was the owner of the said property and entitled thereto. Plaintiff filed a motion for a new trial upon the same grounds set forth in said motion to strike, together with other reasons, referring to the admission and rejection of evidence on the trial; which other reasons were not presented to this court on assignment of error, as the evidence at the trial was not made a part of the record. The court denied the motion for a new trial, and gave judgment upon the verdict. A final judgment was given for plaintiff against defendant Gibbs for amount of demand, and plaintiff brings the case here on error assigned against the intervenor, defendant in error.

Assignment of errors, as follows: (1) The court below erred in overruling the plaintiff in error's motion to strike the pretended petition of intervention of the defendant in error, filed July 13, 1883, from the files of the court, and of this cause. (2) The court below erred in overruling plaintiff's motion for a new trial. (3) The court erred in not sustaining the motion to strike the pretended petition of intervention from the files, upon the grounds set forth in said motion. (4) The court erred in not sustaining the motion for a new trial for the first ground in said motion set forth. (5) The district court erred in dissolving the attachment as to the property described in the pretended petition of intervention.

Mr. GEORGE PUHL, for plaintiff in error.

Mr. C. A. ALLEN, for defendant in error.

STALLCUP, C. By the assignment of errors and argument of counsel, we have one question presented for consideration, and that is as to the constitutionality of the act of 1883, providing the remedy by intervention where the property attached in an action is claimed by a person not party to the action. It is insisted on the part of the ap-

pellant that the act is unconstitutional and void, for the reason that the title thereto does not sufficiently express the subject-matter thereof, as required by section 21 of article 5 of our constitution. The title of said act is as follows: "An act to amend an act entitled 'An act providing a system of procedure in civil actions in the courts of justice of the state of Colorado,' approved March 17, 1877, and to further amend a certain amended section, and to revive and amend a certain repealed section thereof." The said act may be found on page 112 of Session Laws of 1883. It contains three sections beside the "emergency clause" section. The first section thereof amends section 53 of the act providing a system of procedure in civil actions. The second section is as follows:

"Sec. 2. Section 99 of said act, having been heretofore repealed, is hereby revived, re-enacted, and amended so as to read as follows: Sec. 99. In all cases of attachment, any person other than the defendant, claiming any of the property attached, or any lien thereon or interest therein, may intervene without giving bail, but the property attached shall not thereby be replevied or released. Such intervention shall be by verified petition stating the right or interest which the intervenor claims in or to such property; and the same may be filed in said cause at any time before the trial of the cause upon its merits; and as soon as notice of the intervention shall be given to the interested parties to the action, or their attorneys, with reasonable opportunity to them to defend against the same, the same shall be tried as follows: If the intervenor claim the absolute title or ownership to the property, either party shall be entitled to trial by jury; but if the claim be by mortgage, or some interest less than full title or ownership, the trial shall be by court, unless the court shall direct an issue to a jury. In case the verdict or finding shall be for the intervenor, the damages which he has suffered by reason of the attachment of the property may be assessed in such verdict

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or findings, and the intervenor shall recover the same, together with his costs, of the plaintiff in the attachment, and the court shall render such judgment in reference to the attached property as will secure the right of the intervenor thereto or therein, according to such verdict or finding; and in case the verdict or finding shall be for the plaintiff, he shall recover costs against such intervenor; and the court may require the intervenor to give security for costs for like causes and in like manner as the plaintiff may be required to give security for costs in civil actions."

The third section amends section 159 of the act providing a system of procedure in civil actions.

Section 21 of article 5 of our constitution is as follows:

"Sec. 21. No bill except general appropriation bills shall be passed containing more than one subject, which shall be clearly expressed in its title; but, if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

The act referred to contains but one subject, and the same is clearly expressed in the title. In the case of *Clare v. People*, 9 Colo. 122, where this same constitutional provision was considered by this court, with reference to an act entitled "An act to facilitate the recovery of ore taken by theft or trespass, to regulate the sale and disposition of the same, and for the better protection of mine owners," this court held that, there being but one general subject expressed, the fact that the legislature saw fit to incumber the title with two specifications, under that subject, does not render it obnoxious to this constitutional provision; also that the purpose of this constitutional provision was to prevent imposition upon the legislature and the people, through the practice of dealing in bills with subjects of which the titles give no intimation; that this constitutional inhibition must receive a reasonable interpretation, and, whenever a matter con-

tained in the statute may fairly be considered germane to the subject expressed by the title, it is sufficient..

The judgment should be affirmed.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the district court is affirmed.

Affirmed.

McPHEE ET AL. v. O'ROURKE.

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30	332

1. Under the statute concerning homesteads the wife has the character of a head of the family, while occupying with her husband her property as a home, to enable her to designate and affect such home with the character of a homestead, so as to exempt it from seizure and sale for the joint debt of herself and husband.
2. There is no proviso in the statute against its operating against a creditor for material used in improvements upon the property before it was designated as a homestead.
3. The homestead character of the property is not vitiated when the designation thereof for a homestead was for the purpose of preventing a creditor from collecting his debt.

Error to Superior Court of Denver.

BRIDGET O'ROURKE, defendant in error, who was plaintiff below, filed her complaint there on the 27th day of April, 1883, in which she alleged facts, showing ownership and possession of a certain house and lot in the city of Denver, county of Arapahoe, under the value of \$2,000; and that she had been seized and possessed thereof from the 1st day of February, 1883; that during all that time she had been, and still remained, a householder, and head of a family, and so occupied the said premises, together with her family, as a homestead; that on the 5th day of February, 1883, she had duly designated the said premises as a homestead, by proper entry upon the records of the said county, where the deed conveying said property to her was recorded; that on the

17th day of February, 1883, a judgment had been rendered against her jointly with her husband, Dennis O'Rourke, in favor of the said McPhee & McGinnity, by a justice of the peace of said county, and a transcript thereof duly filed and entered in the office of the clerk of the district court of said county, so that on the said 17th day of February the judgment stood as a judgment of that court, and, accordingly, execution thereon then issued to the said Spangler, sheriff of the said county, who by virtue thereof then levied upon said premises, and on the 12th day of March following sold the same, by virtue thereof, to said McPhee & McGinnity for the sum of \$147.90, and accordingly issued to them a certificate of sale.

The relief asked was that said sale be set aside and held for naught, and that the said sheriff be enjoined from making a deed under the said certificate. Answer thereto was filed as follows: "They admit that the plaintiff, at the times mentioned, had the legal title to the premises described in the complaint, but they say that the equitable title belongs to Dennis O'Rourke, the husband of the plaintiff—in this, that the money with which said premises were purchased was the money of the said Dennis O'Rourke, and that he caused the title to said premises to be placed in the plaintiff, that he might, and with intent to, defraud, hinder and delay his creditors. They deny that, at the times mentioned in the complaint, the plaintiff, then or at any other time, was a householder or the head of a family; on the contrary, they aver that the plaintiff is, and was at the time mentioned, a married woman; and is and was the wife of Dennis O'Rourke, and that the said husband occupies the said premises, now and at all times previous hereto occupied the same as the head of the family, and he maintains and provides for said family, and the plaintiff is now, and was at the times mentioned in the complaint, and at all other times, simply a member of the said family, and of which her

said husband, Dennis O'Rourke, was and is the head. They deny that the said plaintiff has occupied said premises at any time heretofore, or does now occupy them with her family; but they admit that the said Dennis O'Rourke has, as head of the family, occupied said premises with his family, and that the plaintiff is a member thereof. They admit that the plaintiff did, on the 5th day of February, 1883, cause the word 'homestead' to be entered of record at the page, in the margin of the record book, in which the deed conveying to her the legal title to said premises was recorded, and that the same was signed and attested as alleged; but they aver that, long before the time when said claim of 'homestead' was entered as aforesaid, the defendants McPhee & McGinnity had obtained the judgment mentioned in said complaint, and the plaintiff, well knowing the premises, caused said entry of 'homestead' to be made with a fraudulent intent to cheat, hinder and delay her creditors, and particularly with the fraudulent intent to prevent the said McPhee & McGinnity from collecting their said judgment. They deny that the sale and certificate of purchase in complaint mentioned, or either of them, are invalid, and they also deny that the same or either of them is a cloud on plaintiff's title. And the defendants further aver that the debt upon which the said judgment was obtained were for lumber and other building material, all of which was sold by the defendants McPhee & McGinnity to the plaintiff and her husband, for use in and upon the said premises, and the said lumber and other material was all used by plaintiff and her said husband in the erection and repair of buildings, and other lasting and valuable improvements thereon, and the credit was given by said defendants to the plaintiff and her husband on the faith and credit of the said premises being liable to execution and sale to satisfy the said debt."

To which answer a general demurrer was filed and sustained; and, the defendants below abiding by their answer, judgment and decree were entered according to the prayer of the complaint as follows: "This cause coming on to be heard on the plaintiff's complaint, the answer of defendants, and the plaintiff's demurrer to the defendants' answer, and having been argued by counsel for the respective parties: Now, therefore, on consideration thereof, it is ordered, adjudged and decreed, and the court doth hereby order, adjudge and decree, that the facts alleged in said defendants' answer are not sufficient to constitute a defense to plaintiff's cause of action, and that the demurrer of the plaintiff thereto be, and the same is hereby, sustained. And the defendants having elected to stand by their said answer, and having refused to answer further, it is further ordered, adjudged and decreed by the court that the sale of said premises described in plaintiff's complaint, to wit: Lot No. twenty-six (26), in block numbered forty-five (45), in Evans' addition to the city of Denver, in the county of Arapahoe, and state of Colorado, and house and improvements thereon, to the defendants McPhee & McGinnity, by the defendant Spangler, on the 12th day of March, A. D. 1883, as set forth in plaintiff's complaint, be, and the same is hereby, set aside, and declared null and void; and that the said judgment of said defendants McPhee & McGinnity be, and the same is hereby, declared to be no lien upon the above-described premises, and that the defendant Michael Spangler, sheriff of Arapahoe county, and his successor or successors in office, be, and they are, perpetually enjoined and restrained from making any deed of the said above-described premises to the defendants McPhee & McGinnity, or to their assigns, in pursuance of the sale thereof, made by said defendant Spangler to said defendants McPhee & McGinnity, on the 12th day of March, A. D. 1883, as alleged in plaintiff's complaint; and that

the plaintiff have and recover of and from said defendants, the costs of this suit to be taxed, and have execution therefor."

From which the cause is brought here by writ of error.

Messrs. MARKHAM, PATTERSON and THOMAS, for plaintiffs in error.

Mr. J. P. BROCKWAY, for defendant in error.

STALLCUP, C. By the record and argument three questions are presented for consideration:

1. Under our statute concerning homesteads, has the wife the character of a head of the family, while occupying with her husband her property as a home, to enable her to designate and affect such home with the character of a homestead, so as to exempt it from seizure and sale for the joint debt of herself and husband? The first and fourth sections of the statute are as follows:

"Section 1. Every householder in the state of Colorado, being the head of a family, shall be entitled to a homestead not exceeding in value the sum of \$2,000, exempt from execution and attachment arising from any debt, contract or civil obligation entered into or incurred after the 1st day of February in the year of our Lord 1868."

"Sec. 4. When any person dies seized of a homestead, leaving a widow, a husband or minor children, such widow or husband or minor children shall be entitled to the homestead."

In the enactment of these provisions the legislature recognized a married woman as a person possessing to some extent the character of a householder and head of a family, though living with her husband. The purpose of the statute is to preserve the home for the family. When the wife is the owner of the property occupied as the home of the family, she is the only one capable of investing it with the exemption character provided by

the statute. Under our statutes the married woman never did occupy the dwarfed position that afflicted her under the common law. Since the act of our legislature of 1874 the married woman has been without disability concerning her property and property rights; and, at the time of the passage of the homestead act in 1868, she owned and controlled all property she brought to the marriage, independent of her husband; had power to carry on business in her own name, to sue and be sued as if single, and to acquire property by her earnings and business, and to hold the same, as if single. So we conclude that, in the nature of things, and in the legislative mind, the husband and wife both possess the character of a householder and head of a family, at least to the extent to enable either of them owning the home they occupy as such, to designate it as a homestead, and that the statute, as is clearly apparent from the language used in section 4, above quoted, is expressive of such view. *Thomp. Homest.* §§ 220-222.

2. Should the act designating the homestead operate as against a creditor for material used in improvements upon the property before it was so designated? As to this question, it is sufficient to say that there is no proviso in the statute against such operation. By failing to take the steps necessary to secure a lien upon the premises, under the provisions of our mechanic's lien act, the right to subject the premises to such debt was lost.

3. Does it vitiate the homestead character of the property when the designation thereof as a homestead was for the purpose of preventing the creditor from collecting his debt? The purpose of the designation of the property as a homestead is to put it out of the reach of creditors while occupied as a home; and such purpose, and the consequent result of such designation, are warranted by the statute, though occurring after the debt was contracted, and immediately before the creditor had

attached or levied upon the property, and though the debtor had no other property liable for his debt. *Barnett v. Knight*, 7 Colo. 365. In no way does the statute rest upon the principles of equity, nor in any way yield thereto. By it we see the policy of the state is to preserve the home to the family, even at the sacrifice of just demands, for the reason that the preservation of the home is deemed of paramount importance. The exemption under the homestead act being confined to debts contracted after the passage of the act, it may well be said that there can be no superior or controlling equity in the premises, and he who gives credit does so with knowledge of the statute, and the purpose and policy thereof, as well as the additional risk thereby occasioned. And whether the title to the home be in the maternal or paternal head of the family, they occupy a position in relation to the state making it more important that such home should be preserved to them, than that it should be taken to pay the legal demands against them collectible by attachment and execution. The duty and relation to the state in such case are of higher import than the duty and relation to such creditor. In the first section of his work on homesteads and exemptions, Mr. Thompson reproduces some expressions from eminent sources upon this view, as follows: "The late Senator Benton, advocating in the United States senate the adoption of a general homestead policy, said: 'Tenantry is unfavorable to freedom. It lays the foundation for separate orders in society, annihilates the love of country, and weakens the spirit of independence. The tenant has, in fact, no country, no hearth, no domestic altar, no household god. The freeholder, on the contrary, is the natural supporter of free government, and it should be the policy of republics to multiply their freeholders, as it is the policy of monarchies to multiply their tenants.' 'There is,' said Tarbell, J., in a case in Mississippi, 'unquestionably, no greater incentive to virtue, industry and love of country

than a permanent 'home,' around which gather the affections of the family, and to which the members fondly turn, however widely they may become dispersed.' 'The law,' said the supreme court of Iowa, in an early case, 'is based upon the idea that, as a matter of public policy, for the promotion of the prosperity of the state, and to render independent and above want each citizen of the government, it is proper he should have a home,— a homestead,— where his family may be sheltered, and live beyond the reach of financial misfortune, and the demands of creditors who have given credit under such law. And this policy is characterized as 'liberal' and 'benevolent.' "

It is also contended by counsel for plaintiff in error that this property was acquired by the defendant in error, Bridget O'Rourke, by a conveyance from her said husband, Dennis O'Rourke, who was jointly indebted with her on the said demand of the said McPhee & McGinnity; that such conveyance was without consideration and in fraud of his creditors, the said McPhee & McGinnity; and that such conveyance should be held void and the property applied to the discharge of his said debt; that it was not rightfully her property when she designated it as a homestead. Such are the premises for a creditor's bill in equity, the consideration of which is impracticable in this action by reason of the want of Dennis O'Rourke as a party to the action. *Allen v. Tritch*, 5 Colo. 222. But even had the husband, Dennis O'Rourke, been made a party, the legal *status* of the parties here would remain unchanged. The judgment of plaintiffs in error was against both the husband and wife, Dennis and Bridget O'Rourke. The conveyance of the property from one to the other could in no way prejudice plaintiffs in error in the collection of their judgment, as it is not such a conveyance as one conveying the property to a person whose property would be beyond the reach of the judgment. Besides, it has been held

that when a conveyance to the wife is made or caused to be made by the husband, for the purpose of placing the home beyond the reach of his creditors, the wife is not precluded thereby from claiming the benefit of the homestead statute, even as against such creditors. *Orr v. Schraft*, 22 Mich. 260; *Edmonson v. Meacham*, 50 Miss. 39. The decree should be affirmed.

We concur: MACON, C.; RISING, C.

PER CURIAM. For the reasons assigned in the foregoing opinion the decree of the superior court of the city of Denver is affirmed.

Affirmed.

BRYAN V. McCAIG ET AL.

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27	500

1. In an action to try title to a mining claim, the court charged the jury that the plaintiff, in order to recover, must prove that he located his claim "by sinking a shaft at least ten feet from the lowest part of the rim at the surface, showing a well-defined crevice; posting at the discovery shaft the usual notice; placing upon the corners and center of the side-lines, stakes, six in all, marked in the usual manner; and record of the claim;" and that if the jury found that the plaintiff proved this, then defendant, in order to make his claim valid, must prove a prior location in like manner. *Held*, that the instruction did not state the requirements of the law as to what the locator of a mining claim must do to make a location, nor did it state the law in regard to marking of the location stakes, or what must be recorded, or when the record must be made, or where; but left the jury to determine the law as well as the fact.
2. In an action between claimants of a mining claim, there was evidence to show that the ore-house built on the claim by defendant was placed there for the use and benefit of another claim, and the court submitted to the jury the question of good faith and intention of defendant to make an improvement upon the claim. *Held*, not error. To make a building erected upon a mining claim an improvement, under the law requiring annual labor, it must have been placed there for the purpose of benefiting the claim, and for its improvement.

3. The court instructed the jury that plaintiff must prove "that the Apex lode was located by sinking a shaft at least ten feet from the lowest rim at the surface, showing a well-defined crevice." *Held*, that the instruction was erroneous, because it did not submit to the jury the question of fact as to whether the crevice contained mineral-bearing rock in place.
4. Under act of congress of March 3, 1881, authorizing the jury to find that the title to the ground in controversy has not been established by either party, a party claiming the right of possession of any part of the public domain, in an adverse suit, by virtue of a mining location, must establish such right by evidence of a compliance with the state and federal statutes relating to the location and holding of mining claims. And it was proper for the court to submit to the jury to find as a question of fact, from the evidence, whether the defendant had complied with such requirements of the statute.

Appeal from District Court, Clear Creek County.

THE facts are stated in the opinion.

Messrs. H. W. HOBSON and LUKE PALMER, for appellant.

Messrs. MORRISON and FILLIUS, for appellees.

RISING, C. Appellant, as owner of the No. 4 lode mining claim, applied for a patent therefor, and appellees, as owners of the Apex lode mining claim, filed their adverse claim, under the provisions of the statutes of the United States, to that portion of said No. 4 claim which was in conflict with said Apex claim; and, within the time required by law, appellees brought this action in support of such adverse claim. The plaintiffs predicate their right to the possession of the premises in controversy upon a full compliance by them with all the requirements of the laws of the United States, and of the state of Colorado, relating to the location of lode mining claims, in the location by them of the Apex lode, and in their complaint allege such compliance, and allege the wrongful entry of defendant upon the premises in con-

troverſy, and the wrongful withholding of the ſame from plaintiffs. The defendant predicates his right to the poſſeſſion of the premises in controverſy upon a full compliance by him with all of the requirements of ſaid laws, in the location and holding of the No. 4 lode by his grantor, prior to the ſaid location of the Apex lode, and by himſelf as purchaſer of ſaid lode, and in his answer to the complaint alleges ſuch compliance. All the material allegations of the answer are put in iſſue by plaintiffs' reply thereto. There is no denial in defendant's answer of any of the allegations of the complaint relating to the compliance by plaintiffs with all the requirements of the law in the location of the Apex lode.

Upon the trial plaintiffs produced evidence in ſupport of the allegations of their complaint, tending to ſhow a performance of all the neceſſary acts to make a location of the Apex lode mining claim, and ſhowing the diſcovery of the lode on the 14th day of June, 1882, and the recording of a certificate of location on the 21ſt day of June, 1882. Defendant did not offer any evidence to rebut the evidence of plaintiffs' location of the Apex lode, but produced evidence in ſupport of the allegations of his answer, tending to ſhow a performance of all the neceſſary acts, except the poſting of the proper notice at the point of diſcovery, to make a location of the No. 4 lode mining claim, and ſhowing the ſurvey of the lode on the 8th day of April, 1880, and the recording of a certificate of location on the 12th day of April, 1880. Defendant alſo introduced evidence for the purpoſe of ſhowing the performance by him, as the purchaſer of the No. 4 lode, of the annual labor required by law for the year 1882, and prior to the diſcovery of the Apex lode by the plaintiffs. The plaintiffs introduced evidence in rebuttal, tending to ſhow that defendant's grantor, in attempting to locate the No. 4 lode, failed to ſink the diſcovery ſhaft upon the lode to the depth of at leaſt ten feet from the loweſt part of the rim thereof at the ſurface.

For the determination of this case, it is only necessary to consider the first and third assignments of error.

The first assignment is that the court erred in giving the following instruction to the jury: "The court instructs the jury that the plaintiff, to recover in this cause, is bound to prove — *First*, that the Apex lode was located by sinking a shaft at least ten feet from the lowest part of the rim at the surface, showing a well-defined crevice; posting at the discovery shaft the usual notice; placing upon the corners and center of the side-lines, stakes, six in all, marked in the usual manner; and record of the claim. And if you find that plaintiffs prove this, it then devolves upon the defendant to prove an older location in the same manner; so that the oldest valid claim should hold the ground. This the defendant seeks to do by means of the No. 4 lode; but if you believe, *first*, that the discovery shaft of the No. 4 lode was not ten feet deep from the lowest point of the rim at the surface at the time of the discovery of the Apex lode in June, 1882, then the No. 4 location is invalid and void; and, *second*, if said No. 4 did not at that time show a well-defined crevice, it is void." This instruction is clearly erroneous in several particulars. The statute requires the locator of a mining claim to post at the point of discovery a sign or notice, containing the name of the lode, the name of the locator, and the date of discovery. The instruction undertakes to tell the jury what the locator is required to do to make a location, and fails to state the requirements of the law correctly. What has been said in relation to the notice is applicable to the instruction as to the marking of the stakes.

That portion of the instruction treating of the record of the claim is too indefinite to mean anything, except that some kind of a record is required. What must be recorded, and when the record must be made, and where, are questions upon which the jury should have been instructed; but upon these questions the jury is left to de-

termine the law as well as the fact. The jury are also instructed that the plaintiffs must prove "that the Apex lode was located by sinking a shaft at least ten feet from the lowest part of the rim at the surface, showing a well defined crevice." This part of the instruction, which states the law correctly, so far as it goes, is incomplete in not stating what the crevice must contain. Under the instruction as given, the crevice shown by sinking the shaft might be absolutely barren of mineral of any kind, and yet the plaintiffs would have complied with the law as given to the jury; but such compliance would not confer any right upon plaintiffs to the possession of the premises, without the further showing that such crevice contained mineral-bearing rock in place. *Van Zandt v. Argentine M. Co.* 8 Fed. Rep. 725. It is also barely possible that the instruction might be misleading to the jury, and be by them taken to mean that the locator must not only sink the discovery shaft ten feet deep from the lowest part of the rim at the surface, as the law requires, but that such shaft must be kept open to that depth. The court erred in giving this instruction.

The court gave the following instruction to the jury at plaintiffs' request: "The court instructs the jury that if you believe, from the evidence, that the building of the ore-house on the surface ground of the No. 4 lode was for the sole use and convenience of the Little Mattie mine, and not intended for the No. 4 lode, then, and in that case, you will not consider such ore-house as improvements on the No. 4 lode, unless you further find, from the evidence, that the ore-house was built in good faith to make a permanent improvement on the No. 4 lode." The third assignment of error is based upon this instruction.

The only objections urged against the instruction by counsel in their argument which call for any discussion are: *First*, that the plaintiffs having failed to plead spe-

cially the non-performance of annual labor on the No. 4 lode, that question cannot properly be brought into the case; and, *secondly*, that it was error to submit to the jury the question of intention and good faith of the owner in building the ore-house.

We do not think these objections well founded. The defense set up in the answer is that defendant has the better right to the possession of the premises by virtue of a valid location thereof, antedating the location of the Apex lode by the plaintiffs, and by virtue of a full compliance by the defendant and his grantor with the requirements of the statute necessary to continue the right to the possession of the premises so located. The replication puts in issue all the allegations of the answer upon which the defense is based. To establish his defense, it was incumbent upon the defendant to show not only a valid location of the premises, antedating the location by the plaintiffs, but to also show that the right to the possession had been kept good by a compliance with the statutes relating thereto. On the trial the defendant undertook to show such compliance by the introduction of evidence relating to the building of an ore-house on the No. 4 lode. The act of congress of March 3, 1881, authorizing the jury to find that title to the ground in controversy has not been established by either party, makes it absolutely necessary that a party claiming the right to the possession of any portion of the public domain in an adverse suit by virtue of a mining location must establish such right by evidence of a compliance with the state and federal statutes relating to the location and holding of mining claims. *Becker v. Pugh*, 9 Colo. 589. The pleadings required proof to be made of a compliance with the requirements of the statute; the policy of the law, without regard to the pleadings, requires such proof to be made. Evidence was introduced tending to show such compliance, and it was proper for the court to submit to the jury to find as a question of fact, from the

evidence, whether defendant had complied with such requirements of the statute.

This brings us to the second objection made to the instruction. The jury were instructed that if they believed from the evidence that the ore-house was built for the sole use of the Little Mattie mine, and was not intended for the No. 4 lode, then they should not consider such ore-house as improvements on the No. 4 lode in their estimate of annual labor, unless they should further find from the evidence that the ore-house was built in good faith to make a permanent improvement on the No. 4 lode. We do not think the court erred in so instructing the jury. The argument of counsel is that if an improvement is put upon a claim by the owner, it does not matter what his intentions were in so doing; that the improvement is what the law requires, and that when the improvement is made the government is satisfied without inquiring into the intentions of the owner in making such improvements. The argument rests upon the assumption that the ore-house was an improvement, and that the jury were only required to determine with what intention it was put on the claim.

The question submitted to the jury for determination was whether an improvement had been put on the claim, and they were told that, in determining whether an ore-house built on the claim was an improvement under the law relating to annual labor, they might consider the good faith and intention of the owner in having it built. To make a building erected on a mining claim an improvement, under the law requiring annual labor, it must have been placed there for the purpose of benefiting the claim, and for its development. *Smelting Co. v. Kemp*, 104 U. S. 636-655. It is absurd to say that a building erected on a mining claim is an improvement on such claim, when such building is not, and was not intended to be, of any use or benefit to the claim. That which does not, and was not intended to, improve the

claim, is not an improvement within the meaning of the statute.

The judgment should be reversed.

We concur: STALLCUP, C.; MACON, C.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the district court is reversed.

Reversed.

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12a 261

EVANS ET AL. V. YOUNG ET AL.

1. A., being the owner of an entire estate, leased the same to B. for a term of years, who erected a building on the premises. A mechanic's lien was filed against the leasehold interest. B. subsequently sold his leasehold interest to A. *Held*, that the entire estate became subject to the lien.
2. When the record does not show that a default was not properly entered, the presumption arises that the required notice was given.

Appeal from District Court, Arapahoe County.

THIS action was commenced in the county court of Arapahoe county, by appellees, Young & Savin, against the Denver Natatorium & Physical Culture Association, the Colorado Mortgage & Investment Company, James H. Jones, and appellant John Evans. The complaint was filed April 1, 1882. All the defendants were duly served with summons. The complaint was upon an account of \$540, for building materials sold and delivered to the said natatorium association about the last of August, 1881, for and used in the building then being erected by the said association upon lots 29 and 30, in block 48, East Division of Denver, said county, in which premises the said association then held a leasehold estate, upon a lease from the said John Evans. Said complaint also showed a mechanic's lien upon the said account, in favor

of said Young & Savin, against the said leasehold estate; that the said mortgage company and James H. Jones were made parties, for that a deed of trust conveying the said leasehold estate to James H. Jones had been executed, by the said association, for the purpose of securing a loan from the said mortgage company, and said John Evans was made party, for that he was the owner of the estate subject to said leasehold estate, and was supposed to have acquired the said leasehold estate. On April 6, 1882, answer of said mortgage company and James H. Jones was filed, in which answer it was set forth "that, before the commencement of the said action, these defendants executed and delivered to the said John Evans an assignment of all the right, title and interest theretofore held by these defendants in the lease of the premises described in the complaint, and these defendants claim no interest or estate in the premises mentioned." Upon which disclaimer, on the 19th day of May, 1882, the said defendants were dismissed from said action, upon the motion of the said Young & Savin, plaintiffs there. On the 17th day of April, 1882, for want of answer, demurrer or motion, default was duly entered against said association. On the 21st of June, 1882, said John Evans filed his answer, so that said Evans was the only contending defendant in the action. Upon the hearing of the cause, the court entered final judgment against the said association on the default, to the extent of limiting the lien to the said leasehold estate, and limiting the said leasehold estate to a term of five years, and for the amount claimed; and decreed in favor of the said Evans, and against the said Young & Savin, from which decree appeal was taken to the district court by the said Young & Savin, and the cause was there referred to a referee to find and report a decree.

From the evidence it appears that on the 5th day of July, 1881, said Evans executed a lease for a term of ten years of the said premises to said association. The

terms of the lease were such that the lessee was required to pay \$125 per month rental, the taxes on the premises, and to erect a certain building thereon, and provided for the forfeiture of the estate in case of failure to perform. The association at once entered into the possession and commenced the erection of the said building thereon, and about the last of August of the same year the said materials were sold, and delivered by said Young & Savin to said association, to and for the erection of said building; and in due time notice of a mechanic's lien was filed and asserted against the said premises. The building progressed, but not to completion.

On the 20th day of September of the same year the said association borrowed from the said mortgage company the sum of \$3,000, and conveyed its leasehold estate in the premises to said James H. Jones in trust for security for such loan, and at the same time assigned and delivered to the said mortgage company the said instrument of lease of said premises for the same purpose. The said association finally failed to pay the said loan at maturity, and failed to complete said building, and in the month of March, 1882, the said debt being due and unpaid, the said deed of trust was duly foreclosed, and the said mortgage company was the purchaser at such sale, and received the deed from the said trustee accordingly, and thereby became vested with the said leasehold estate, subject to the said mechanic's lien claim. And on the 1st day of April, 1882, the said mortgage company paid to the said Evans all the rentals at that time due, after which, and on the same day, and for the sum of \$3,000, paid by said Evans therefor, the said mortgage company sold, assigned and delivered to the said Evans the said leasehold estate, and also delivered the said instrument of lease, with a written assignment thereof on the back thereof, and also a bill of sale of material, etc., upon said premises; so that the said Evans then and there became vested with the said leasehold estate, and

improvements thereon, together with the possession of said premises.

It also appears that the said lien had been duly asserted and filed, and that the said action had been commenced in due time; that, at the time of the transfer to the said Evans, said mechanic's lien claim was spoken of, it being stated on the part of the said mortgage company that they thought the said deed of trust to said mortgage company was prior in time to the said mechanic's lien. It also appears that, after the answer of the said mortgage company, and previous to the hearing and final decree in the cause, that the said mortgage company had purchased the entire premises from the said John Evans. The referee's findings and report were as follows:

"MARCH 18, 1884.

"Finding of referee as follows: *First.* That plaintiffs, Young & Savin, furnished the materials charged for, amounting in value to the sum of \$540.24, to the Denver Natatorium & Physical Culture Association, to be used by that corporation in the building then in process of erection by it on lots numbered 29 and 30, in block 48, East Denver, then held by said corporation under lease by defendant John Evans for a term of years, and that said materials were used in said building. *Second.* That while said lease was in full force, and said lots were held thereunder, plaintiffs, in substantial compliance with the statute, filed in the office of the recorder of Arapahoe county notice of their claim, and of their purpose to claim a lien therefor upon the said lots and building. *Third.* That subsequently defendant John Evans, who held the fee in said lots, with notice of the lien as claimed by plaintiffs, purchased the term of said corporation held as aforesaid, and paid therefor the sum of \$3,000, and so merged the leasehold in the fee. As matters of law he finds that plaintiffs had a valid lien upon the term and interest of the said corporation in the said lots, and building thereon, to secure the payment of their said

debt, and that defendant John Evans took the said term and interest under his purchase aforesaid charged with the said lien; that the plaintiffs have now a lien upon said lots so held by said Evans, at least to the extent of \$3,000, the amount paid for the claim of said corporation to secure their said debt, to wit, the sum of \$540.24, with interest thereon at the rate of ten per cent. per annum from the 1st day of September, A. D. 1881, and the costs of this suit. To foreclose and enforce this lien a decree may be prepared. It appears from the proof that the Colorado Mortgage & Investment Company, Limited, has purchased and now owns the said lots (taking them with notice of the said lien, as it would seem), but, said corporation not being a party to the suit, its rights will be reserved in the decree.

[Signed]

“ JAMES A. DAWSON, Referee.

“ DECREE OF THE REFEREE.

“ And this cause having come on to be heard upon the amended bill of complaint herein, and the answer thereto of the defendant John Evans, the default of the defendant the Denver Natatorium & Physical Culture Association having been heretofore duly entered of record, and upon the proofs taken in this cause; and it appearing to the court that the defendant the Denver Natatorium & Physical Culture Association did, on and before the 1st day of September, A. D. 1881, hold and possess a certain leasehold interest and estate in and to the lots numbered 29 and 30, in block 48, in the east division of the city of Denver, county of Arapahoe, and state of Colorado, which said lease was made by the defendant John Evans, who appears to have then been the owner of the fee-simple title to said lots, which said leasehold estate extended from the 5th day of July, A. D. 1881, for, during and until the 5th day of July, 1891; and it further appearing to the court that the plaintiffs furnished lumber for the construction of a certain building partially erected by

the said defendant the Denver Natatorium & Physical Culture Association, on the said lots 29 and 30, in block 48, under a certain contract with the defendant the Denver Natatorium & Physical Culture Association, by which contract the said defendant the Denver Natatorium & Physical Culture Association agreed to pay to the plaintiffs the sum of \$540.24, on the 2d day of September, A. D. 1881, at which date the last of said lumber was delivered by the plaintiffs upon said lots to the said defendant the Denver Natatorium & Physical Culture Association; and it further appearing to the court that the plaintiffs did, within forty days from the date when the last of said lumber was furnished to the said defendant the Denver Natatorium & Physical Culture Association, duly file its certain notice of a mechanic's lien on the said lots 29 and 30, in manner and form provided by law, and that this action was commenced within six months thereafter; and it further appearing to the court that on the 28th day of September, 1881, the said leasehold estate so held and possessed by the said defendant the Denver Natatorium & Physical Culture Association was duly assigned and transferred to the Colorado Mortgage & Investment Company of London, and that thereafter, and on or about the 1st day of April, 1882, the said lease and leasehold estate was by the said Colorado Mortgage & Investment Company duly assigned and transferred to the said defendant John Evans; and it further appearing to the court that the said defendant John Evans, on the 1st day of April, 1882, still continued to be the owner of the fee-simple title to said lots, and that, by the said assignment or transfer, the leasehold estate formerly held by the said defendant the Denver Natatorium & Physical Culture Association became merged into the fee-simple estate; and it further appearing to the court that the rights of the plaintiffs under their said notice of lien have never been legally foreclosed or destroyed; and the cause having been argued by counsel, and the court

being now sufficiently advised in the premises: therefore it is ordered, adjudged and decreed that the plaintiffs do have and recover of and from the Denver Natatorium & Physical Culture Association the sum of \$682.15, and costs of suit. And it is further ordered, adjudged and decreed that the said judgment be a lien on the said lots 29 and 30, in block 48, East Denver, Arapahoe county, Colorado; and that in the event that the said sum is not paid forthwith, execution issue therefor; and that the sheriff of Arapahoe county shall be, and is hereby, directed to levy the said execution upon the said lots 29 and 30, and to sell the same, or as much thereof as may be necessary for the purpose of paying and discharging the said judgment, together with costs of suit. All rights of the Colorado Mortgage & Investment Company of London, Limited, not affected by notice shown in the record of this cause, are hereby reserved. I report the foregoing decree. JAMES A. DAWSON, Referee."

To which findings and report the following exceptions were filed on the part of the said Evans: "*First*. Because the findings of the said referee, and each of them, are contrary to the evidence introduced before the said referee. *Second*. Because the said findings, and each and every of them, are contrary to the law of the case. *Third*. Because the said referee permitted testimony to be introduced on the part of the plaintiffs contrary to law, and against the objection of the said defendant. *Fourth*. Because the said referee refused to permit the said defendant to introduce proper and lawful testimony offered in his own behalf. *Fifth*. And for other good and sufficient reasons apparent upon the face of said referee's report."

The exceptions were overruled by the court, and decree entered as reported; from which the cause is brought here on appeal by the said Evans. The errors assigned are as follows: "(1) The court erred in overruling appellant's demurrer to appellees' amended complaint. (2) The court erred in overruling the exceptions of appellant

to the report of the referee herein. (3) The court erred in overruling appellant's objection to the following interrogatory propounded by the appellee to the witness Walter P. Miller: 'Please state the substance of those papers which were delivered, as you say, to Captain Gray, as the agent for Governor Evans.' (4) The court erred in permitting appellees to read in evidence the certain trust deed marked 'Exhibit A,' the resolution of the Denver Natatorium & Physical Culture Association, 'Exhibit B,' and the notice and lease marked 'Exhibit C,' against the objection of appellant. (5) The court erred in permitting the witness Percy Austin to read in evidence, from a certain book purporting to be the record of the proceedings of the board of directors of the said Denver Natatorium & Physical Culture Association, the certain report of August 4, 1881, on page 11 thereof, and in overruling objection of appellant thereto. (6) The court erred in permitting the appellees to read in evidence the answer of Glyn W. E. Griffith, and in overruling objection of appellant thereto. (7) The court erred in permitting appellees to read in evidence a certain lease, set out in folios 232 to 245, and in overruling objection of appellant thereto."

Mr. H. C. DILLON, for appellant.

Mr. JOHN L. JEROME, for appellees.

STALLCUP, C. Counsel for appellant in their argument have arranged the errors assigned under three heads, and have accordingly presented the same for consideration.

1. It is argued that the lessee cannot bind the estate of the lessor with a lien. This proposition may be conceded; but when the lessor, being the owner of the entire estate, subject only to the lease, buys the said leasehold estate, and thereby becomes vested with the entire estate, and possession and control thereof, he does not thereby remove the incumbrance of a third party upon the estate so purchased. By so uniting the two estates, the lesser

estate became extinguished by sinking into the greater estate, leaving the lien resting upon the entire estate, unless the two estates for equitable purposes should be held and treated as being separate and distinct. From the evidence it appears that appellant sold and conveyed the entire estate. Having so done, it may be doubtful if he could thereafter be permitted to treat the leasehold estate and the fee as separate and distinct. *James v. Morey*, 2 Cow. 268; *Koenig v. Mueller*, 39 Mo. 165.

But the two estates, when owned by the same person, are only regarded in equity as separate when equitable considerations justify or require such action; and since appellant purchased the lease with full knowledge of the lien rights of appellees, and since the leasehold estate was of much greater value than the amount of the lien, as evidenced by the sum paid therefor by appellant, we are of the opinion that no equitable consideration exists requiring us to hold that an absolute merger did not take place. *Smith v. Roberts*, 91 N. Y. 476; *Koenig v. Mueller*, *supra*.

2. It is argued that the decree was invalid as to the Natatorium Association, and consequently invalid as to appellant. This argument rests upon the assumption that judgment was rendered against the association without legal notice of the proceedings after appeal. Assuming that appellant has the right to question this part of the decree, we must declare the objection not well taken. The prayer for the appeal and order of the county court allowing the same are general, and covered the entire decree. Counsel for appellant do not question the right of Young & Savin to take the appeal in this way. They assume that the whole cause, by the appeal, was taken to the district court for a trial *de novo*. The decree in the district court, which is part of the record proper, recites the filing therein of the amended complaint, the answer thereto of appellant, and the entry of default against the association. There is nothing in the

record to show that this default was not properly entered, and, in favor of the regularity of the proceedings, the presumption arises that any notice required was given. If notice was not given the association of the proceedings, the record does not show the fact; and, if the record omits or misrecites any material matter, counsel should have procured a correction thereof.

3. It is argued that the decree was not supported by the evidence. It is contended on the part of appellant that the evidence shows that the said building materials were not sold upon credit to the said association, but to one Griffith, and on this account there was no right to a lien. If such were the facts in the case, they might defeat the lien; but, from the evidence adduced, the findings were against this view, and we see no reason to disturb such findings. It is also contended that the building provided for by the terms of the lease was not completed in the time therein specified, and the lease, by its terms, was subject to forfeiture. Be this as it may, the lease never was forfeited, and the leasehold estate never was so terminated, as no forfeiture was ever claimed or asserted by appellant. He preferred to acquire the estate by purchase, after receiving the rental to April 1st; thereby repelling any claim or intention of a forfeiture thereof, he then purchased the leasehold estate, together with the improvements and materials on the premises, and so received possession thereof. It is therefore apparent that he did not acquire the leasehold estate by forfeiture, but by purchase.

The decree should be affirmed.

We concur: MACON, C.; RISING, C.

PER CURIAM. For the reasons assigned in the foregoing opinion the decree of the district court is affirmed.

Affirmed.

POLK V. MOOK.

10	326
12	207

Where the evidence on the trial was conflicting the judgment will not be reversed on the ground of insufficient evidence to support it.

Error to El Paso County Court.

Mr. J. C. COCHRAN, for plaintiff in error.

Mr. E. J. HOOKE, for defendant in error.

MACON, C. In December, 1882, Polk, plaintiff in error, sued defendant in error, Mook, before a justice of the peace of El Paso county, for \$300. The justice of the peace gave judgment for defendant, and plaintiff appealed to the county court. In the latter court Polk recovered judgment against Mook for \$25 and costs. In February, 1883, Polk sued out execution from the county court, after the issuance of which Mook paid the judgment and costs into the county court, and moved that the plaintiff, Polk, be required by the court to enter satisfaction of said judgment upon the records of said court, and upon his failure so to do, that the county court enter such order, and also praying that the execution be recalled. On the hearing of said motion defendant, Mook, offered in evidence the receipt of the county judge, E. A. Colburn, for the judgment and costs, and the plaintiff, Polk, gave in evidence an assignment by himself to one J. B. Cochran and others, of the said judgment. The court sustained said motion so far as to recall said execution, to which the plaintiff, Polk, excepted, and is in this court on error to the ruling of the court on said motion, and also to the judgment rendered at the trial.

This court, on motion, struck out of the record all that part which related to the action of the county court in the proceedings after the rendition of the judgment, and there is nothing left for review here except the propriety of the judgment itself. As the evidence in the county

court was conflicting, we are not warranted in disturbing the judgment, and the same ought to be affirmed.

We concur: STALLCUP, C.; RISING, C.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the county court is affirmed.

Affirmed.

SUPPLY DITCH COMPANY V. ELLIOTT ET AL.

1. The legal effect of a plea of tender is an unanswerable presumption of indebtedness to the extent of the tender, and when the tender is brought into court for the use of the plaintiff, that amount is considered as stricken from the complaint. If more is claimed the plaintiff proceeds for the excess of his demand above the tender only.
2. A demurrer admits all the material facts well pleaded in the pleading to which the demurrer applies.
3. Argumentative pleading is bad under all systems of pleading.
4. The relation of stockholders to the corporation whose stock they hold is that of contract, and the rights and duties of both parties grow out of contract implied in a subscription for stock, construed by the provisions of the charter or articles of incorporation.
5. The corporation is a trustee for its stockholders and is bound to protect their interests.
6. Certificates of stock are assignable and pass from hand to hand by indorsement as bills of exchange and promissory notes pass, and holders of such certificates are *prima facie* presumed to be *bona fide* owners thereof.
7. A corporation is ordinarily justified in treating the assignee and holder of certificates of stock as the legal and equitable owner thereof.
8. Any transfer of stock by a corporation upon its books, in the absence of the original certificate, is made at its peril, and the real owner of the stock, evidenced by such certificate, loses nothing thereby; upon stock so issued by wrong or mistake the corporation is liable to a *bona fide* holder thereof.

10	327
19	219
10	327
22	522
7a	151

10	327
f38	278
f38	279

Error to District Court, Boulder County.

THE facts are stated in the opinion.

Messrs. DOLLOFF and RITTENHOUSE, for plaintiff in error.

Mr. B. L. CARR, for defendant in error.

MACON, C. From the admissions of the pleadings in this case the following facts appear: During and prior to the year 1883, plaintiff in error was an incorporated ditch company, owning an irrigating ditch, and having its capital stock divided into shares, each of which entitled the holder thereof to take from said company ditch ten inches of water for irrigating purposes, upon the condition that he applied for such water before or by the 20th day of May of the year in which he desired to use the water, and pay or secure to the company the sum of \$1 per inch for all the water he might use. In 1879 one Moyer owned two shares of the stock of plaintiff in error, and pledged the same to one I. M. Phillips in trust to secure the payment of a debt due from him to one John Phillips. When this pledge of stock was made, the certificates thereof had not been issued by the company, but the company was advised of the nature of the transaction between Moyer and Phillips, and recognized the right of Moyer to the stock by allowing him to use water and vote at meetings of the company. It seems that no certificates for these shares were issued by the company until the 28th day of September, 1882, when the company, without the consent of Moyer, issued two certificates for his stock to I. M. Phillips, numbered respectively 385 and 386. Before the issuance of the certificates to I. M. Phillips, and on the 18th day of September, 1882, Moyer assigned absolutely these two shares of stock to defendant in error Elliott; but no notice of such assignment was given to the company by Elliott, or any other person, until some time in June, 1883.

In January, 1883, one Yates sued I. M. Phillips, and in the statutory way attached these two shares of stock; and on the 8th day of February, 1883, the same were sold by the sheriff of Boulder county, under the judgment obtained by said Yates against said I. M. Phillips; and one C. J. Buck became the purchaser thereof, who, on the next day, left with the secretary of the company a copy of the certificate of sale issued to him by the sheriff, which was by said secretary placed on file in the proper book of the company. When Yates brought his suit, and when the sale was made to Buck of these shares, both Yates and Buck had notice of the extent and character of I. M. Phillips' interest in said shares of stock.

On the 19th day of May, 1883, defendant in error Elliott applied to plaintiff in error for twenty inches of water, in addition to thirty inches to which he was entitled under three shares of stock in the plaintiff company, but did not inform it of his ownership or claim of right to the Moyer shares, and left the company in ignorance of his claim thereto, and tendered \$20 for the additional water demanded, which demand and tender were refused by plaintiff in error. Again, about the 1st of June following, Elliott produced to the plaintiff in error an order in writing from said Moyer, directing the company to transfer on its books to him (Elliott) the said two shares of stock, and about the same time both I. M. and John Phillips, in writing, directed the company to make such transfer to said Elliott, and release to him all their interest and right in and to said stock. Upon the presentation of these orders to the company, Elliott demanded the transfer of the stock to him on the company books, but made no demand for water; nor did he tender payment or security to the company for the twenty inches of additional water demanded on May 19th.

When this demand was made by Elliott for the transfer of the said stock, the two certificates numbered 385

and 386, before that time issued to I. M. Phillips, were still in the possession of said Phillips, and were not produced to the company by either Elliott or Phillips, and no offer was made to surrender such certificates at that time nor until about the 13th day of July following. The company refused to make such transfer to Elliott; and, after the refusal of the company to transfer this stock to Elliott (but at what date does not appear), defendants in error took forcibly, and against the will of the company, twenty inches of water under Elliott's claim of right to the said Moyer stock; for the taking of which this action was brought.

Defendants answered and set up four distinct defenses: *First*, that they did not take the water unlawfully; *second*, that plaintiff was not damaged as alleged in the complaint; *third*, admitting the taking of the water, but justifying under a claim of five shares of stock in the plaintiff company, two of which were the said Moyer shares; and, *fourth*, setting out all the facts on which said Elliott's right to the stock was based, and the other facts which have already been stated in this opinion, and brought into court the sum of \$20 as the price and value of the water taken and used by them, and for which this action was brought. Plaintiff replied to the third defense, admitting said Elliott's ownership to three shares of stock, as alleged by him in said defense, but denied his ownership to more than the three shares, and to the fourth defense filed its demurrer; the court overruled the demurrer, and plaintiff electing to stand thereby, the court rendered judgment for defendants, that the suit be dismissed, and that they be allowed to take out of court the \$20 which they had tendered.

In defending the action defendants relied upon Elliott's ownership of the Moyer stock, and the right to twenty inches of water thereunder, as a contract right, growing out of the relation of said Elliott to the plaintiff company as a stockholder therein. He relied upon his right

as a contract right, by virtue of the stock, and a compliance with the regulations of the plaintiff set up in his fourth defense. If Elliott had been the owner of the stock, and the company had accepted the tender of \$20 made to it by him on the 19th of May, 1883, he would have been entitled to water, upon proper application or proceeding therefor; and the defense rests upon the assumption that he was such owner, and that the tender made was equivalent to payment of the water dues. Having used the water after tender, and brought the money into court they acknowledged that they were indebted to the company to that extent, and the duty of payment.

It is evident that in its judgment the court sustained defendants' defense, recognizing his contracts rights, and held the tender equivalent to payment, and that by the tender the defendants were the owners of so much water, which they had taken from the ditch of plaintiff and used. The legal effect of a plea of tender is an irrebuttable presumption of indebtedness to the extent of the tender, and when the tender is brought into court for the use of plaintiff, that amount is considered as stricken from the complaint; and if more is claimed by plaintiff, he proceeds for the excess of his demand above the tender only. *Bank v. Sutherland*, 3 Cow. 336; *Spalding v. Vandercook*, 2 Wend. 431; *Johnston v. Insurance Co.* 7 Johns. 315; *Hubbard v. Knous*, 7 Cush. 556. After a plea of tender, a plaintiff may be nonsuited in proceeding to recover beyond the tender. *Jenkins v. Cutchens*, 2 Miles, 65; *McCredy v. Fey*, 7 Watts, 499. From this position, it follows inevitably that, if the court were right in finding the defense made out, it erred in adjudging the money brought into court in support of the tender of May 19th to defendants. The effect of the judgment, in such case, was to give to defendants under the contract both the water and the money, which, by their fourth defense, they confess the payment or security of was a condition precedent to their right to use the water.

But as we shall hereafter see, defendant wholly failed to sustain his alleged defense.

The first assignment of error — “That the court erred in overruling the plaintiff’s demurrer to the further and separate answer and defense contained in defendants’ answer” — presents a question that will be best disposed of by first referring to a few rules and principles of pleading, and to some of the settled rules of the law of corporations.

As to the rules of pleading which it is necessary to examine here, it may be said that it is elementary that a demurrer admits all the material facts well pleaded in the pleading to which the demurrer applies, and all the necessary intendments and inferences of and from such facts, but no more, and that, as to all facts not alleged in a pleading attacked by a demurrer, or arising from necessary inference out of the facts alleged, they are assumed not to exist. *Jones v. Latham*, 70 Ala. 164, in which case a demurrer was filed to a bill in equity, and the court held the following language: “It is our duty to construe the bill most strongly against the pleader, and, on such a motion as this, to hold that every material fact not averred does not exist;” citing *Cockeral v. Gurley*, 26 Ala. 405; *Lucas v. Oliver*, 34 Ala. 631. In the next place, argumentative pleading is bad, under all systems of pleading in this country. The application of these rules will be made further on in this opinion.

The law of corporations applicable to the questions under discussion will be stated in a few words:

First. The relation of stockholders to the corporation whose stock they hold is that of contract, and the rights and duties of both parties grow out of contract, implied in a subscription for stock, construed by the provisions of the charter or articles of incorporation.

Second. The corporation is a trustee for its stockholders, and is bound to protect their interests. 1 Mor. Corp. § 237, and cases cited; *Lowry v. Bank*, Taney, 310; *Bayard*

v. Bank, 52 Pa. St. 232; *Atkinson v. Atkinson*, 8 Allen, 15; *Shaw v. Spencer*, 100 Mass. 382; *Fisher v. Brown*, 104 Mass. 259; *Duncan v. Jardon*, 15 Wall. 165.

Third. Certificates of stock are assignable, and pass from hand to hand by indorsement, as bills of exchange and promissory notes pass, and holders of such certificates are *prima facie* presumed to be the *bona fide* owners thereof, and an innocent purchaser thereof for value will hold them against the true owner, where the latter has placed it in the power of the assignor to perpetrate a fraud upon the innocent assignee. *Lanier v. Bank*, 11 Wall. 369. In that case Justice Davis, speaking for the court, says: "The power to transfer their stock is one of the most valuable franchises conferred by congress upon banking associations. Without this power, it can readily be seen the value of the stock would be greatly lessened, and obviously, whatever contributes to make the shares of stock a safe mode of investment, and easily convertible, tends to enhance their value. It is no less to the interest of the shareholder than the public that the certificate representing his stock should be in a form to secure public confidence; for without this he could not negotiate it to any advantage. It is in obedience to this requirement that stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they become the basis of commercial transaction in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form nor character negotiable paper, they approximate to it as nearly as practicable. If we assume that the certificates in question are not different from those in general use by corporations (and the assumption is a safe one), it is easy to see why investments of this character are sought after and relied upon. No better form could be adopted to assure the purchaser that he can buy with safety. He is told under the seal of the corporation that the shareholder is entitled to so much

stock, which can be transferred on the books of the corporation in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know that whoever in good faith buys the stock and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes farther, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates."

Fourth. A corporation is ordinarily justified in treating the assignee and holder of certificates of stock as the legal and equitable owner thereof. *Lanier v. Bank, supra.*

Fifth. Any transfer of stock by a corporation upon its books, in the absence of the original certificate, is made at its peril, and the real owner of the stock, evidenced by such certificate, loses nothing thereby; but upon the stock so issued by wrong or mistake, the corporation is liable to a *bona fide* holder thereof. *Davis v. Bank*, 2 Bing. 393; *Pollock v. Bank*, 7 N. Y. 274; *Cohen v. Gwynn*, 4 Md. Ch. 357; *In re Railway Co.*, L. R. 3 Q. B. 584; *Donaldson v. Jaillot*, L. R. 3 Eq. 374; *Sewall v. Boston W. P. Co.* 4 Allen, 277.

Testing the admitted facts of this case by these rules of law, it is manifest that the demurrer to the fourth defense ought to have been sustained. When, on the 19th day of May, 1883, defendant in error Elliott applied for the water, and tendered the \$20, the company did not know he was the owner of this Moyer stock, and he did not so inform it. He did not even declare himself to be such owner, and exhibited no evidence of title. He did not then demand a transfer of the stock to himself on the company books, but made his request for water, as a mere stranger desiring to buy so much water. We say this, because in the answer there is no averment that Elliott informed the company of his rights in the prem-

ises, either orally or by any written evidence; nor does it appear that at that time he made any demand for a transfer of the stock to himself, nor presented the certificates he claimed by assignment from Phillips. To assume from the averments of the cross-complaint that he did so would be the most vicious kind of argument, which no court will make in favor of the pleader. The absence of all allegations to that effect, by the sound rules of pleading, require the assumption that no such facts existed, and the company was bound, in the absence of such evidence, from its duties to its stockholders, to refuse to recognize Elliott as the owner of the stock, and was justified in refusing to permit him to take any more water from the ditch than he was entitled to under the three shares of stock admitted to belong to him. If on that occasion Elliott did submit to the company proper evidence of his title he should have so alleged in his pleading. The company, therefore, was not in default in refusing to accept the tender of \$20, and to permit Elliott to take the water for which he applied, and, if not in default, then defendants in error were not justified in taking the water as they did. Hence, unless the conduct of the plaintiff in error in refusing on the 1st day of June, 1883, to transfer the stock to defendant in error Elliott was so far wrong as to justify defendants in their conduct,—if trespass could be excused,—there is nothing in the case to relieve them from the charge of trespass upon the property of plaintiff in error. To determine this question a brief review of the transactions of June 1st, between the company and the defendant in error Elliott, Moyer, and the two Phillips, is necessary. From the admitted averments of the cross-complaint, it appears that, on June 1st, Elliott did not demand water under these shares, nor offer to pay for it, but only required the transfer of the stock to himself. That he did not then have in his possession the two certificates for this stock, but that they were in the possession of I. M.

Phillips; that the latter did not, until about six weeks after this demand by Elliott, surrender these two certificates to the company for Elliott's benefit. As has been seen, a corporation always acts at its peril in issuing stock to an alleged assignee thereof, in the absence of the assigned certificates, because, if new certificates of stock are issued without the surrender of the old ones, and such new stock passes into the hands of an innocent purchaser, it will be good in his favor against the corporation.

Here, then, on June 1st, a demand was made on the company for a transfer of this stock, upon the order of Moyer and the two Phillips, but the certificates were not produced, and no excuse or explanation was given for their non-production. When, on the books of the company, was recorded the certificate of sale of this same stock to Buck on February 8th preceding? The company did right in refusing to make the transfer. But, if the missing certificates had been produced, and offered for cancellation, and the transfer had been made, such act alone would not have entitled defendants in error to the water. They still had to pay, or offer to pay or secure, the \$20 due the company for the water, before they could lawfully demand it. This they failed to do, and by reason of such failure they could have no right to withdraw water from the ditch, and in doing so were trespassers.

The court erred in overruling the demurrer to the cross-complaint; and for this the judgment must be reversed and the cause remanded, with directions to proceed according to law.

We concur: RISING, C.; STALLOUP, C.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the district court is reversed and the cause remanded for a new trial.

Reversed.

• TRITCH V. NORTON ET AL.

10	337
11	200
10	337
13	481
10	337
27	198

1. The lien of the mechanic or material-man, under the statute, begins with the commencement of the work or furnishing material under his express or implied contract with his employer, and attaches upon whatever estate the latter may have at the commencement of such work or the furnishing materials, and is superior to all after-acquired liens and any prior liens or incumbrances of which the mechanic or material-man had no actual or constructive notice.
2. Courts do not enforce contracts between parties, the execution of which is legally impossible.
3. The rule of *caveat emptor* applies against a mechanic as well as in the case of a vendee.
4. If a contractor proposes to erect a building or to put labor or materials on a piece of ground, it behooves him to assure himself of the fact that the person with whom he contemplates making his contract, or for whose benefit he is about to employ means or labor, has such an interest or title unincumbered as will enable him to avail himself of a valid lien.
5. Under our system of registration, if the mechanic or material-man fails to inform himself, the law will not relieve him against the consequences of his own negligence.

Appeal from County Court of Arapahoe County.

THE facts are stated in the opinion.

Messrs. MARKHAM and DILLON, for appellant.

Mr. I. E. BARNUM, for appellees.

MACON, C. This action was commenced in September of 1882, by appellees Norton & La Due, on their demand for balance due them on their contract with Machen for the construction of a dwelling-house, and for the enforcement of their mechanic's lien asserted for the same against lots 7, 8, 9 and 10, in block 9, in Waddell & Machen's subdivision of Denver. Machen and others were made parties defendants, appellant being the only contending defendant at the hearing of the cause.

In their complaint, plaintiffs alleged that on March 15, 1882, Machen was owner of said lots 7, 8, 9 and 10;

that on that date they entered into a contract in writing with him, whereby it was agreed that plaintiffs should construct for him a brick dwelling-house, with basement, etc., on said lots 9 and 10, for the sum of \$3,500, payable \$400 when first-story joists were on, \$400 when second-story joists were on, \$400 when brick work completed, \$500 when house inclosed, \$400 when ready for plastering, \$400 when plastering completed, \$500 when ready for painting, \$500 when house completed; that the situation of the house was as directed by Machen; that on the 11th day of August, 1882, plaintiffs duly completed the same in accord with the terms of said contract, and besides did extra work thereon, to the amount of \$100, at request of Machen; that \$1,600 had been paid upon the contract, and the remainder, \$1,900, thereon, and the \$100 for the extra work, remained due and unpaid; also alleged all the necessary steps fixing the mechanic's lien to the said premises for this amount. Afterwards, on December 2, 1882, by leave of court, plaintiffs filed an amendment to their complaint, in which it was alleged that appellant Tritch had become interested in the premises by purchase since the commencement of the action, and while *lis pendens* was duly of record in the records of said county, containing full notice of the action, and its purposes, and asked an order that said Tritch be made party to the action, and that it might be decreed that whatever interest he might have in the premises be subject to the lien of plaintiffs. Whereupon Tritch came and answered, denied the allegations of the complaint, except those concerning *lis pendens* notice, and alleged as follows:

“But defendant says that the plaintiffs, in disregard and violation of a contract, which they had made with said Machen to build him a house on lots 9 and 10, where said Machen desired it, did, without the knowledge, consent or authority of said Machen, enter upon lots 7 and 8, and commence to do certain work upon and about the

erection of a building thereon, where said Machen did not desire such building, and that after said work had so progressed on said lots 7 and 8 to a considerable extent, just how far this defendant does not know and has not information sufficient to enable him to state, the said Machen discovered that the plaintiffs, in disregard and violation of their agreement and contract set out in the complaint herein, were erecting a building on lots 7 and 8 instead of lots 9 and 10, and thereupon the said Machen notified the plaintiffs thereof, and that the said building was not being located as in the contract provided and he desired. Then the said Machen and the plaintiffs, as this defendant is informed and believes, made and entered into some sort of a new contract and agreement, not in writing, by which the plaintiffs were to be allowed to proceed to the completion of said building, which they had in violation of their said contract begun, on said lots 7 and 8, instead of lots 9 and 10 as aforesaid, it being understood and agreed that the said Machen should pay them therefor a certain sum in money, the exact amount this defendant does not know, and cannot state, and the remainder, amounting to one-half or more of the total cost thereof, the said Machen was to satisfy and pay, by conveying to plaintiffs certain lots in the said Waddell & Machen's addition, or elsewhere, the number, designation and location of which this defendant does not know and cannot state; that the written contract should and did then and thereby terminate, and was by mutual consent and by the action of the parties thereto canceled and set aside, except that probably the plans and specifications therein mentioned were to govern in the completion of the building under said new contract.

“And this defendant says that in order to enable himself to comply with this proposition of settlement, and enter into said new contract as aforesaid, and before the same was entered into, the said Machen was compelled to borrow the money to pay to plaintiffs, and that

this defendant did loan the said Machen the sum of \$1,500 with which to make payment. For said sum of \$1,500 the said Machen executed his certain promissory note, and also conveyed the said lots 7, 8, 9 and 10 to Job A. Cooper, trustee, with the sheriff of Arapahoe county, successor in trust for the use and security of this defendant as aforesaid. That by said conveyance, this defendant had and acquired a prior and superior lien upon the said lots 7, 8, 9 and 10; that the money loaned by this defendant to said Machen, and secured by said note and deed of trust as aforesaid, was paid to plaintiff, and fully met and paid off and satisfied any and all claims they had upon or against the said Machen on any account, up to the date thereof, and that the plaintiffs had full knowledge of the loan by this defendant Machen of the money aforesaid, and of the execution by said Machen of the said trust deed; and the said trust deed was, upon the 6th day of May, 1882, the day of its date, duly placed of record in the office of the recorder of Arapahoe county. Whatever work or labor was done, or material furnished, by the plaintiffs thereafter, was done and furnished with full knowledge and notice of the said trust deed, and that the same was a first, superior and prior lien upon the whole of said lots 7, 8, 9 and 10.

“ This defendant, further answering, says that the said Machen did not make payment of said note, and the interest thereof, according to the terms and tenor thereof, and according to the stipulations and provisions of said trust deed, but did make default, and that thereupon this defendant, as he had a right to do, did cause and require the said sheriff of Arapahoe county, successor in trust as aforesaid, to advertise the said lots for sale to satisfy, pay off and discharge the said note, and the accrued interest thereon; and the said sheriff of Arapahoe county, successor in trust as aforesaid, did duly advertise the said lots 7, 8, 9 and 10 for sale, for the purposes aforesaid, as by law and by the terms of said trust deed he was re-

quired to do; and pursuant to said advertisement, and in accordance with the law in such cases made and provided, did, on the 27th day of September, A. D. 1882, at the front door of the court-house, on Lawrence street in the city of Denver, county of Arapahoe, state of Colorado, sell the said lots, with all the improvements thereon, to the highest bidder at public auction, and at said sale this defendant, being the highest and best bidder, became the purchaser of the same, for and at the price of \$1,900, which satisfied his said debt as aforesaid, and left \$242.50 over and above the amount of principal and interest and costs thereof, which said balance this defendant paid to the sheriff of Arapahoe county as successor in trust as aforesaid, and the said sheriff, as such successor in trust, executed and delivered to this defendant his deed, whereby the said lots 7, 8, 9 and 10, as set out in the complaint herein, were conveyed to and became the property of the defendant.

“By reason of all which this defendant became and is the sole owner of the said lots, and each and all of them, and the improvements thereon, and defendant denies that the plaintiffs have any claim against or any lien upon the same, or any part thereof, on account of the matters and things set out in their complaint and amended complaint; and says that any lien, or pretended lien, of plaintiffs, acquired or sought to be acquired upon the same, by and in virtue of the notices, or pretended notices, to said Machen, as set out in the complaint, was, if valid for any purpose, subsequent and inferior to the lien of this defendant as hereinbefore set forth; and that the lien of this defendant aforesaid having been foreclosed, and the said lots conveyed to him pursuant to law, this defendant prays that so much of the complaint of plaintiffs as seeks to subject said lots, or any part thereof, to any claim, or pretended claims, of plaintiffs against the said Machen, be disallowed and dismissed; and prays

that he be quieted in his title and possession of the said premises, and for his costs and all proper relief.”

To which plaintiffs replied as follows:

“REPLICATION OF GEORGE TRITCH.

“The plaintiffs reply: (1) That they deny that they did work or furnished any material and did construct said house in part on said lots seven (7) and eight (8) without any direction from said Machen so to do, and they deny the allegation that said work and labor was performed, and said material furnished, as aforesaid, without any contract with said Machen so to do. (2) They deny that, in violation and disregard of the contract which they had made with said Machen to build him a house on lots 9 and 10, where said Machen desired it, they did, without the knowledge or consent or authority of said Machen, enter upon lots seven (7) and eight (8) and commenced to do certain work upon and about the erection of a building thereon where said Machen did not desire said building; and they deny that after said work had so progressed to a considerable extent on said lots seven (7) and eight (8) that said Machen discovered that the plaintiffs, in disregard and violation of their agreement and contract, which agreement is set out in said complaint, were erecting a building on lots 7 and 8, instead of lots 9 and 10; and they deny that, thereupon, he notified them thereof, and that said building was not being located as the contract required and as he desired; but they admit that when he discovered his own mistake in the lots as set out in the complaint, that he did notify them that he had made a mistake in the location of the building; and they deny that when said Machen discovered that a mistake had been made in the location of the house, that a new contract, not in writing or in any form, was made, by which the plaintiffs were to be allowed to proceed to the completion of said house, which, as alleged in said answer,

they, in violation of that contract, had begun on lots 7 and 8, instead of lots 9 and 10; and they deny that it was understood or agreed that the said Machen should pay them therefor a certain sum of money, and that the remainder, amounting to one-half or more of the total cost thereof, the said Machen was to satisfy and pay by conveying to plaintiffs certain lots in the said Waddell & Machen's addition or anywhere else; and they deny that it was agreed that the written contract should or did thereby terminate, and deny that it was by the mutual consent and by the action of the parties thereto canceled and set aside in any regard whatever; and they deny that, in order to comply with any such proposition of settlement, and to enter into said new contract, and before the same was entered into, said Machen was compelled to borrow money to pay said plaintiffs; but they admit that he did pay them some money about the time he discovered his said mistake; but these plaintiffs do not know where he got the same, and leave said defendant to his proof thereof; and they admit that said Machen did give his promissory note to said Tritch, secured by a trust deed on lots 7, 8, 9 and 10, substantially as set forth in said answer; but they deny that said trust deed created or became a lien on said lots, or any of them, prior to the mechanic's lien of these plaintiffs thereon; and they say said trust deed, and its lien and its rights, in connection therewith, are subsequent to and subject to the lien of these plaintiffs on said lots; and they say that, before the completion of said building, and before the filing of said notices, and before the institution of this suit, said Tritch had sold and disposed of said note, given by said Machen to one or both of said McIntyres, who are defendants herein, and he had no interest whatever in said note or said lots at the time of instituting this suit; and they say that said trust deed was not foreclosed under the directions of said Tritch, as the holder of said note, but was foreclosed under the direction of one or both of said

McIntyres, and that said Tritch became the purchaser at said sale, with the full knowledge of all the rights and claims of said plaintiffs in the premises, and was not an innocent purchaser thereof,—that he so purchased with full knowledge of this suit.”

After which the following amendment to the complaint was made by consent: “And now come the said plaintiffs, by permission of the court, and in pursuance of the consent hereto annexed on the part of defendant, George Tritch, and file this amendment to the first paragraph of the second allegation, in the first cause of action, by striking out the words ‘that on or about the 15th day of March, A. D. 1882, said defendant Edward C. Machen was the owner of said lots seven (7), eight (8), nine (9), and ten (10), in block 9,’ inserting in the place thereof the following: ‘That on or about the 15th day of March, A. D. 1882, said defendant Edward C. Machen was the owner of lots nine (9) and ten (10), and about the 6th day of May following he became the owner of lots (7) and eight (8), all of block 9.’”

At the hearing of the cause May 28, 1883, Tritch was the only contending defendant. Judgment for \$2,000 was given against Machen, in favor of plaintiffs, and decreed a lien on said lots 7 and 8, and superior to the title of Tritch, with order of sale of the premises to satisfy the lien. Tritch moved for a new trial, which was denied, and he brings the cause here on appeal.

The evidence, as shown by the bill of exceptions, is as follows:

“Bill of exceptions as follows, to wit: Be it remembered that on, to wit, the 28th day of May, A. D. 1883, the said cause came on to be heard, as well on the issues joined between the plaintiffs herein and the defendant George Tritch, as upon the other issues in said cause, and the trial of said cause by a jury was waived, and the same was submitted to the court, and upon the trial of said issues the following facts were proven:

“(1) That upon the 15th day of March, A. D. 1882, a contract was entered into between the plaintiffs and the defendant Machen, for the erection of a brick dwelling-house upon lots 9 and 10, in block 9, in Waddell & Machen’s addition to the city of Denver.

“(2) That the plaintiffs and defendant Machen, upon the 20th day of March, A. D. 1882, went to locate the ground upon which the building was to be erected (Machen not knowing the exact location of said lots 9 and 10), and with a tape line, held at one end by plaintiff Norton, and at the other end by defendant Machen, they measured off the ground, until defendant Machen believed he had located said lots 9 and 10, and the plaintiffs commenced the erection of the said dwelling-house on what plaintiffs and Machen believed was said lots 9 and 10, and by direction of said Machen.

“(3) That on or about the 25th day of March, plaintiffs commenced the erection of said brick dwelling by the excavation on said lots for a cellar or basement story for said dwelling, and by the erection of said dwelling, which was of brick and two stories in height, and with brick basement and foundation walls sunk into the earth, said dwelling being constructed as are ordinary brick dwellings in the city of Denver.

“(4) That the plaintiffs continued the erection of said dwelling until about the 4th day of May, A. D. 1882. At this last-mentioned date the said dwelling was constructed up to the second-story joists, and was ready for the roof. At this last-named date defendant Machen discovered that a mistake had been made in locating the lots upon which said dwelling was to be erected, and by said mistake the dwelling was being erected on lots 7 and 8 in said block, instead of upon said lots 9 and 10.

“(5) That the said Machen had no interest or title in or to said lots 7 and 8, either at the time the erection of the building was commenced or when said mistake was dis-

covered, but, on the contrary, they belonged to and the title was in one R. A. Long.

“(6) That upon discovering the mistake, the said Machen negotiated with the said Long for the sale and conveyance to him, Machen, of the said lots 7 and 8, and the price was agreed upon between Long and Machen for said lots.

“(7) And said Machen did not then have the money to purchase said lots 7 and 8, and he negotiated with the defendant George Tritch for the loan to him, Machen, by the said Tritch of the money with which to purchase the said lots 7 and 8, and the said Machen agreed with Tritch that if he would loan the money to purchase said lots, he would execute his note to said Tritch for the money loaned, and would execute his deed of trust upon said lots 7 and 8 to secure the payment of said note. The said Tritch agreed to this arrangement.

“(8) That to effect the purchase of lots 7 and 8, and to secure the money therefor by the loan as aforesaid, and to secure the payment of said loan by the execution of the deed of trust aforesaid, the defendant Machen and the said Long, owner of lots 7 and 8, and defendant Tritch, met together upon the 6th day of May, A. D. 1882, and thereupon said Long executed a deed of warranty, conveying to Machen said lots 7 and 8, and the said Tritch paid to said Machen the sum of \$1,500, it being the said loan theretofore agreed upon. Said Machen thereupon executed his note to the said Tritch for the said \$1,500, and executed and acknowledged a deed of trust, in the usual and ordinary form, conveying to Job A. Cooper said lots 7 and 8 as trustee, to secure the payment of said note for \$1,500, and providing in said deed for the sale at public auction of said lots 7 and 8 at the request of the holder of said note, in the event of the non-payment of said note at maturity. The said deed of trust contained all the usual provisions as to notice, etc., and no objection is taken as to its sufficiency to effect

the objects of the trusts. Thereupon the said Machen paid said Long the purchase price of said lots, and Long delivered to Machen the deed for said lots, and Machen delivered to said Tritch said promissory note and deed of trust, and thereupon, and upon the same day, said warranty deed and deed of trust were filed for record in the recorder's office of Arapahoe county at the same identical period of time.

“(9) That the plaintiffs thereafter completed the erection of said dwelling-house, in the manner as provided in the said contract they should, and the same was completed upon the — day of —, 1882; that when said building was completed there was due the plaintiffs from said Machen upon the said building under the contract the sum of \$1,900.

“(10) That within forty days from the completion of said building, the plaintiffs filed their notice of lien in the recorder's office of said county, in all things as set forth in the complaint, and they did commence this suit to foreclose this lien within six months from the filing of said notice of lien for record, and no objection is taken to the time of filing said lien or the sufficiency of notice, or to the time when said suit was commenced.

“(11) That subsequent to the execution of said several deeds, defendant Tritch assigned the said note for value to —, and the said Machen wholly failed to pay said note at maturity. Upon such failure, the holders of the note ordered the trustee in said deed of trust to advertise and sell said lots 7 and 8, as provided in said deed of trust, to satisfy said note and interest, and the trustee did advertise said property as directed. That at the sale of said lots at the time fixed in the notice of sale, the defendant George Tritch became the purchaser, and he bid for said lots at said sale the sum of \$1,800, which sum was duly paid to the trustee, to be disposed of by him under the trust.

“(12) The trustee in said deed of trust, upon the 27th

day of September, A. D. 1882, in pursuance of said sale and the powers conferred upon him by the deed of trust, executed and delivered to the defendant Tritch his deed of conveyance as such trustee of said lots 7 and 8, and by such deed he did convey, demise and quitclaim the said lots 7 and 8 unto the said George Tritch. No question is made as to the legality and sufficiency of the said sale and conveyance.

“(13) The said George Tritch did file said trustee’s deed for record in the recorder’s office in Arapahoe county, September 27, 1882.

“(14) At the time the said Machen discovered said mistake and received the conveyance of said lots 7 and 8, the plaintiffs had been paid in full the instalments due them under the contract. And the foregoing was all the evidence introduced in said trial, and were all the facts proven thereat. And thereupon, after argument by counsel, the court did find the issues joined as between the plaintiffs herein, and the said Geo. Tritch, in favor of the plaintiffs. Whereupon said defendant Tritch filed his motion for a new trial of said cause; which motion was overruled by the court, and the above decree rendered upon the findings, to which defendant below excepted and appealed to this court.”

Seven errors are assigned by appellant as ground for reversal of the decree; all of which will be determined and disposed of by the decision of the second, which is that “the court erred in the adjudging and decreeing that appellees do have a lien on the real estate in controversy, and the structure thereon, and decreeing that appellant do hold his interests in said premises and said structure subject to said lien.”

The admitted facts in the record present three questions for solution: *First*, was the lien claimed by and decreed to appellees prior in time to the trust deed of appellant? *second*, if it was not, had appellees any equities in the case by which such trust deed should be post-

poned to their lien? and, *third*, if appellees cannot maintain a lien upon lots 7 and 8, as against appellant, can they upon the house situated upon lots 7 and 8?

The lien claimed by appellees depends for its validity upon the act of February 12, 1881, by which it is provided: "All persons performing work or labor, or furnishing materials, by contract, express or implied, with another, or his agent, to the amount of not less than \$25, on or for any structure upon the land of that other, or in or to which that other has an interest, tenancy or claim of any sort whatever, shall have a lien upon such land and structure to the extent of such ownership, interest, claim or tenancy had at the time of the commencement of such work or labor or furnishing such materials, and a lien on such structure where the other has no ownership, interest, tenancy, or claim of, in or to such land, on complying with the terms of this act." "Sec. 3. It shall be the duty of the county clerk and recorder to record such statement in a separate book, provided for that purpose, and, from the time of such filing, the amount so stated shall become a lien on said land or structure, or both, to the extent of the ownership, interest, claim or tenancy as aforesaid of the title, subject, nevertheless, to adjudication as hereinafter set forth." "Sec. 11. So much land as may be occupied by any such structure as may be necessary for the convenient use and occupation of the same shall be subject to the liens hereinbefore provided for, and all such liens shall relate back to the commencement of work or labor, or of the furnishing of materials by the claimant, and shall have priority over any and every lien or incumbrance subsequently intervening, or which have been created prior thereto, but which was not then recorded, and of which the lienor under this act had no notice."

It is thus seen that the lien of the mechanic or material-man begins with the commencement of the work or furnishing material under his express or implied contract

with his employer, and attaches upon whatever estate the latter may have at the commencement of such work, or the furnishing materials, and is superior to all after-created liens, and any prior liens or incumbrances of which the mechanic or material-man had no actual or constructive notice when his work began, or he began to furnish material.

In this case, Machen, the employer of appellees, had no title or estate of any sort in or to the two lots 7 and 8 when appellees commenced the erection of the house, nor any right or license from the owner thereof to go upon them for any purpose. The agreement between Machen and appellees was for building a house upon lots 9 and 10. That in all that was done by these parties in the construction of this house upon lots 7 and 8, prior to May 6, 1882, they were trespassers, cannot be denied, and upon a proposition so elementary the citation of authorities is unnecessary. It follows that no lien in favor of appellees could attach upon such *lots* while they remained the property of Long. But on May 4, 1882, Machen discovered the mistake in the location of the house, and informed appellees thereof, whereupon (it is proper to infer from the evidence) the work thereon was suspended, and was not again resumed until after Machen acquired the title to these lots on May 6, 1882. At the same instant of time that Machen's title vested, appellant took his trust deed to secure the money advanced by him to Machen. Between the acquisition of title by Machen and the creation of appellant's incumbrance there was no interval of time which the law will recognize. Upon the conclusion of the negotiations by Machen for the purchase and conveyance to him of the premises in question, appellees proceeded to complete the unfinished building.

Upon ascertaining the mistake in the location of the building, it was the duty of appellees to desist from further work under the original agreement. Failing to

do so, they would have become wilful trespassers, and as such would not have been entitled to any benefit of the lien statute for improvements thereafter made. This conclusion is not affected by the fact that, under the last clause of section 1 above quoted, they might possibly, by proper proceedings, have secured a lien upon the building had anything been due for work and material furnished previous to the 4th of May.

It follows, therefore, that appellees must be held to have proceeded, after the 6th of May, under a new contract, express or implied. To the suggestion that, subsequent to this date, they acted, as far as possible, under the terms and conditions of the previous agreement, it is answered that, if such be the fact, that agreement must be regarded as then re-adopted, and that, for the purposes of this case, its existence dates from the time of such re-adoption. But it is doubtful if it can be truthfully said that after the 6th of May appellees proceeded, or could have proceeded, under the old contract. They were fully paid for all improvements made prior to the 4th of May. On that date they were apprised of the fact that they had been open trespassers upon lots 7 and 8. A fair inference from the evidence is that they then ceased work, as it was their duty to do, and did not resume until after the purchase by Machen. The agreement to complete an unfinished building on lots 7 and 8 varied in an important and material particular from the agreement to build a house on lots 9 and 10. Leaving out of view appellees' situation as wilful trespassers, had they continued work after May 4th, and before Machen's purchase, an action for the value of improvements thus made could hardly have rested upon the original contract. Courts do not enforce contracts between parties, the execution of which is legally impossible. They might, had they not been wilful trespassers, perhaps have recovered compensation for such improvements; but we are not prepared to say that they could have done so by a suit upon the old contract. It therefore results necessarily that the incum-

brance of appellant is prior in time to the lien of appellees, because the lien of the latter, if it exists, arises out of a contract subsequent in time to the execution of appellant's trust deed.

Then, are there any equities in favor of appellees which can or should postpone appellant's lien to theirs? Appellees' counsel in argument contend that such equities arise out of the fact, first, that appellant knew of the mistake as to the location of the house when he advanced his money with which Machen paid for the lots. Of this fact there is no proof, though the parties exhibit great care and caution in agreeing upon the conclusions of fact shown by evidence on the hearing of the case in the court below. But if counsel mean such notice existed on the part of Tritch, by reason of the rule that a vendee or an incumbrancer of land is held in equity to know the rights of all persons in possession or occupancy thereof, as fully as he could learn them by inquiry of such persons, and that this applies in favor of the mechanic building any structure thereon at the time of such purchase or incumbrance, we are unable to see how this will aid them. Assuming appellant did not see appellees at work on the premises in erecting this house, and made inquiry of them as to all that it is claimed he should have done, what would have been the result? He would simply have learned that they had been for the past thirty or forty days trespassing upon the property of Long, from which act they did not acquire any right of lien upon the lots. He would further have learned that at that time Machen owed them nothing on the house, and that, by the mistake in locating the house, the agreement between them and Machen was at an end, and that, if they should ever go on and finish the house, it would be under a new and different agreement from that made March 15th. Certainly, this was the situation at that time, and a knowledge of it would not have prejudiced appellant, nor made it inequitable in him to take a lien on these lots.

The person in possession must have some rights in or

to the premises which the law will recognize and enforce, the knowledge of which the intending purchaser or incumbrancer can obtain by inquiry. But it never was held that a knowledge of or notice to such person that the occupant might by agreement with the owner of the land acquire some lien thereon or some rights therein, in the future, would bind him to respect such after-acquired rights in case he should purchase the land. And this is precisely the rule now contended for by appellees upon this point.

When appellant advanced his money, and took his security on the lots, he knew, say appellees, all he could have learned by inquiry of them, as to their relations with Machen, and their rights in and to these lots 7 and 8, which, as has been shown, were nothing; but by inference, they say, he also must have known that, after Machen should acquire the title to the lots from Long, he would then enter into an agreement with appellees for the completion of the house, or permit appellees to proceed to build the house, without any express agreement. This is the plain meaning of appellees. But if this all be admitted, it comes to nothing more than notice to appellant that, after his lien should be created, his grantor would or might create other liens upon the estate. Would the case be different if, instead of this asserted lien being a mechanic's lien, it was that of a second or third mortgagee? Clearly not under the statute. And will it be seriously contended that, in the case supposed, the knowledge of appellant that Machen intended to put a second or third mortgage upon the premises would have prejudiced his priority as against all subsequent incumbrances? It follows necessarily from these considerations that appellees can have no priority over appellant, by reason of any supposed knowledge he may have had of the future intentions of Machen and appellees, for the completion of the unfinished house.

Next, it is insisted that, as appellant knew of the

prosecution of work on the house, and the completion of the same, after the execution of his trust deed, and did not object to it, he is now bound to postpone his security to the lien of appellees. To this there are two answers: *First*, there is in the record no evidence that appellant had any knowledge or notice of the work going on upon the house at any time before he was made party to this suit; and, *second*, if he did, he would not have been affected by such knowledge. It certainly is not the law that a mortgagee shall give actual notice to the world of his incumbrance. He is required to record it, and when he has so done he may rest in perfect security as to any further liens which the mortgagor may see fit to create on the property.

Mr. Phillips, in his book on Mechanics' Liens, says, at section 232: "The lien of the mechanic in such case, for work or labor done upon mortgaged property at the instance of the mortgagor, is subordinate to that of the mortgagee, although the latter knew of such work and labor at the time the mechanic rendered the same, and did not object." *Card v. Bank*, 23 Conn. 355; *Hoover v. Wheeler*, 23 Miss. 314; *Pride v. Viles*, 3 Sneed, 125.

So far from its being appellant's duty in this case to have notified appellees of his rights in the premises, it was their duty, before doing work under the new contract, to have consulted the record, and to have made inquiry of him as to any facts which the record failed to disclose. Again, referring to Phillips in the same section, we find the rule upon this point stated thus: "The rule of *caveat emptor*, therefore, applies against a mechanic as well as in the case of a vendee. If a contractor proposes erecting a building, and furnishing materials or putting labor on a lot of ground, it behooves him to examine and assure himself of the fact that the person with whom he contemplates making his contract, or for whose benefit he is about to employ means or labor, has such an interest or title unincumbered as will enable him

to avail himself of a valid or efficient lien. Under the system of registration in this country, a little diligence will always impart to a person the requisite information: and if he fails to inform himself, the law will not relieve him against the consequences of his own negligence." *Brigwell v. Clark*, 39 Mo. 170.

As a further reason why appellant should be postponed to appellees, it is contended that, since appellees can maintain a lien on lots 7 and 8 as against Machen, they can also maintain it as against appellant, because he stood in privity with Machen when he advanced his money for the security of which he took the trust deed, and is thereby affected by the same fact and knowledge as would affect Machen, and to the same extent. As has already been said, there is no proof of such knowledge on the part of appellant, and the conclusion of appellees that he had such knowledge is to be deduced alone from the doctrine of privity. But vendor and vendee, mortgagor and mortgagee, deal at arm's length. Between them there is no such relation as gives rise to this doctrine and its consequences. Under the rule here contended for by counsel for appellees, there could be no such person as an innocent purchaser of land, where there was any wrong in the sale upon the part of the vendor; and the impregnable defense in courts of equity of a *bona fide* purchase for value, without notice of defects of title, could have no existence. The case fails to disclose any fact which can justify the postponement of appellant's rights to those of appellees as to lots 7 and 8.

The last point relied on by appellees to support the decree herein is that, though they may be unable to maintain a lien on the lots as against appellant, they can against the house under the provisions of the act referred to, by force of the clause, "and a lien on such structure where the other has no ownership, interest, tenancy or claim of, in or to such land." It is impossible to accept

this application of the clause in question, assuming it to be constitutional, for the obvious reason that Machen was not in the predicament pointed out therein. He was not within its terms or meaning. He was not, when the new contract was made, and the work thereunder commenced, to wit, after May 6, 1882, a person without ownership, interest or claim of, in or to the land, but was the equitable owner of the same, and as such was entitled to the possession thereof, with the right to improve it, and did not hold the house as something distinct from the land, but owned it by virtue of his ownership of and title to the land; so that both it and the lots constituted but one article of property, which was real estate. Upon Machen's title there is no doubt that appellees were entitled to a lien; but in the enforcement thereof they could occupy no better situation than that of their debtor, as against the appellant. They could sell no greater estate than Machen had when their lien attached. That estate, as we have seen, was subject to an incumbrance in the hands of appellant, and it cannot be denied that, if appellees had foreclosed their lien before the foreclosure of the trust deed of appellant, the purchaser at such foreclosure sale would have bought the property subject to the trust deed, and under the liability to have been sold out under the same.

The title of Machen to the land, carrying with it all that is considered and held to be land, necessarily gave him title to the house, as part thereof, so that in law there was no structure within the meaning of the statute referred to, distinct from the land, upon which a lien could take effect. Assuming for the purposes of this case that the last clause of the section was intended to apply where the land referred to therein is owned by a third person in fee, we do not feel like extending the provision by saying that the peculiar lien mentioned therein was intended to be given in a case where the owner of the building has an interest of any kind in the

realty. The statute nowhere, even by implication, repeals the common-law right of the mortgagee of real estate to subject all improvements made thereon by the owner or mortgagor, subsequently to his incumbrance, to the payment of his demand; but, on the contrary, recognizes and expressly postpones this statutory lien to all prior liens and incumbrances of which the mechanic or material-man had actual or constructive notice at the commencement of his work or the furnishing of the materials. It follows necessarily from these conclusions that the county court erred in decreeing that appellant should hold his title to the premises in question subject to the lien of appellees, and in the directions given for the enforcement of such lien, and that so far the decree must be reversed.

The decree should be reversed and the bill dismissed as to the appellant.

I concur: MACON, C.

I dissent: STALLCUP, C.

BY THE COURT. For the reasons assigned in the foregoing opinion of the majority of the supreme court commissioners, the judgment of the county court is reversed and the cause remanded, with directions to dismiss the complaint as to the appellant.

Reversed.

NEVIN ET AL. V. LULU & WHITE SILVER MIN. Co.

1. Plaintiff had brought suit for an injunction to restrain defendants from working certain mines which plaintiff then claimed to own absolutely under a certain conveyance. This action was dismissed with plaintiff's consent. *Held*, that he was not estopped from bringing a suit under the same conveyance as a mortgage, claiming payment thereunder, and, in default of payment, foreclosure and sale.

10	357
23	132
10	357
17a	266
10	357
19a	62
19a	356

2. In a suit in equity the relief demanded does not limit the plaintiff in respect to the remedy which he may have. The court will disregard the prayer, and rely upon the facts alleged and proved as the basis of its remedial action.
3. This court cannot review the findings of the court below upon which a decree is based, unless the bill of exceptions brings up the evidence upon which the findings are to be reviewed; and when this is not done, this court will assume that the evidence given was sufficient to justify the decree.
4. Under the code, a mortgage cannot be foreclosed without a sale of the mortgaged premises under a decree of foreclosure.

Appeal from District Court, Clear Creek County.

THE facts are stated in the opinion.

Messrs. MONTGOMERY and WAYBRIGHT, for appellant.

Messrs. T. J. CANTLON and C. C. POST, for appellee.

RISING, C. On the 14th and 15th days of July, 1880, the defendants Robert W. Nevin, James S. Nevin, Ann B. Ross and Oliver P. Ross conveyed to Isaac Taylor and Charles C. Miles, by warranty deeds, certain mining claims situated in Clear Creek county, Colorado, and procured one Henry Thompson to convey to said Taylor and Miles, by warranty deed, one of said mining claims.

On the 15th day of July, 1880, the following agreement was entered into:

"Article of agreement made and entered into this 15th day of July, A. D. 1880, by and between Isaac Taylor and Charles C. Miles, of Peoria county, Illinois, of the first part, and Robert W. Nevin, James S. Nevin, Oliver P. Ross and Ann B. Ross, of Clear Creek county, Colorado, of the second part, witnesseth, that the said parties of the first part, for and in consideration of the covenants and agreements hereinafter set forth, to be kept and performed by said parties of the second part, agree as follows, to wit: To notify parties of the second part that they, the parties of the first part, will either accept the undivided one-half of certain lode mining

claims situate in the county of Clear Creek, state of Colorado, known as the 'Lulu Lode' and the 'White Extension West Lode,' on Red Elephant mountain, Downieville mining district, or that the said parties of the first part will not accept the undivided one-half of said real estate. Should said parties of the first part agree to accept the undivided one-half of said premises, then, and in that event, the said parties of the first part hereby agree to convey the undivided one-half of said premises to said parties of second part in proportion as follows: To Robert W. Nevin, the undivided one-fourth ($\frac{1}{4}$) of the White extension west lode; to James S. Nevin, the undivided one-fourth ($\frac{1}{4}$) of the White extension west lode; to Robert W. Nevin, the undivided one-sixth ($\frac{1}{6}$) of the Lulu lode; to James S. Nevin, the undivided one-sixth ($\frac{1}{6}$) of the Lulu lode; to Oliver P. Ross, the undivided one-twelfth ($\frac{1}{12}$) of the Lulu lode; to Ann B. Ross, the undivided one-twelfth ($\frac{1}{12}$) of the Lulu lode. To pay said parties of the second part the sum of eight thousand (\$8,000) dollars, to be paid out of the first net proceeds of said parties of the first part's interest in said lodes, the said sum of money to be paid to said parties of the second part as their interest may appear. The notice above mentioned to be given by parties of the first part to said parties of the second part must be given in writing, and must be given within ninety (90) days from the date of this agreement. Should parties of the first part elect not to retain the undivided one-half ($\frac{1}{2}$) of said premises, and notify parties of the second part of such election as aforesaid, then, and in that event, the said parties of the first part hereby agree to convey said premises to the said parties of the second part in such proportions as their interests may appear, upon the payment by said parties of the second part to said parties of the first part of the sum of twelve thousand dollars (\$12,000), payable within ninety days from the date of the last-mentioned notice, with interest thereon at the rate of ten per cent. per

annum, interest to accrue from the date of this instrument. The said parties of the second part, for and in consideration of the foregoing covenants and agreements, hereby agree to and with said parties of the first part as follows: To pay, or cause to be paid, to said parties of the first part said sum of twelve thousand (\$12,000) dollars within the ninety days last above mentioned, and upon failure so to do within the time specified, time being of the essence of this agreement, then said parties of the second part release, relinquish, waive, sell, quitclaim, and hereby do release, relinquish, waive, sell and quitclaim to said parties of the first part, all right, title, equities, interests or demands of, in and to the above-mentioned premises.

“Witness the hand and seals of the parties hereto this 15th day of July, A. D. 1880.

“ISAAC TAYLOR. [SEAL.]

“CHARLES C. MILES. [SEAL.]

“ROBERT W. NEVIN. [SEAL.]

“JAMES S. NEVIN.” [SEAL.]

On the 6th day of October, 1880, Taylor and Miles notified said defendants, in accordance with the terms of said agreement, that they elected not to retain the undivided one-half of said premises, but had elected to take from said defendants the sum of \$12,000, with interest, and tendered deeds of conveyance for said claims as provided for in said agreement. Defendants did not then pay, and have not since paid, said sum of \$12,000, and interest, or any part thereof. On May 11, 1881, Taylor and Miles conveyed said premises to the plaintiff by quitclaim deed.

Plaintiff in its complaint alleges that the said sum of \$12,000 was loaned to said defendants by Taylor and Miles; and that the deeds from defendants and Thompson were given as security for the payment of said sum, with interest at ten per cent. per annum, within ninety days from the date said sum should be demanded by Taylor and Miles; and pray that said deeds may be adjudged

and decreed to be a mortgage, for a foreclosure of the mortgage, and sale of the mortgaged premises, and for judgment against said defendants for any deficiency.

Defendants in their answer deny that Taylor and Miles loaned them \$12,000, or any other sum; allege that plaintiff corporation was created for the express purpose of acquiring the said mining claims, and not for the purpose of purchasing or dealing in mortgages, and set up the agreement above set out; and allege that the conveyance to plaintiff by Taylor and Miles was not intended to assign or transfer to plaintiff any claim which Taylor and Miles may have had against defendants for said sum of \$12,000, nor any rights or lien which Taylor and Miles may have had for the recovery of payment thereof.

For a second defense, defendants allege that, on June 14, 1881, plaintiff commenced an action against defendants, praying a perpetual injunction against them, restraining them from working the Lulu mine, and based its claim for such injunction upon its rights to possess said claims, under the conveyance thereof by Henry Thompson; that defendants answered the complaint in said action, admitting the conveyance by Thompson and themselves to Taylor and Miles, and alleging that said conveyances were made as a mortgage, to which answer plaintiff replied, denying that said conveyances were made as a mortgage, and alleging that said conveyances were absolute and without condition, verbal or written. Said suit was voluntarily dismissed by the plaintiff August 15, 1881. Taylor and Miles testified in said case that they did not purchase one-half of said Lulu mining claim, but that they made an absolute purchase of the whole of said claim from Henry Thompson, with an agreement from defendants.

Plaintiff's replication to defendants' answer alleges that the conveyance to it by Taylor and Miles did purport, and was intended to assign, and did assign and transfer to plaintiff, any and all claim said Taylor and

Miles may have had at the time of said transfer against defendants for said sum of \$12,000, and interest, as well as any and all right and lien which they had at the time of said transfer for the recovery and payment of said sum and interest; and that plaintiff has the same right and title to said debt, and to the enforcement thereof, that Taylor and Miles had, or could have had, under the conveyances to them by defendants and Thompson.

Trial to the court, and decree June 28, 1883, that plaintiff is entitled to recover of the defendants Robert W. Nevin, James S. Nevin, Oliver P. Ross and Ann B. Ross the sum of \$12,000, and interest; that said defendants pay said sum to plaintiff, or its solicitors, on or before nine calendar months from July 25, 1883, with costs of suit; that in default of such payment, the title to the premises rests in plaintiff and its assigns, and the clerk of the court to certify the substance of the decree; and that certificate may be recorded, and the same shall be evidence of the extinguishment of defendants' right and title to the premises; and that said debt of \$12,000, and interest, shall from that time be wholly extinguished; that if defendants pay said sum, and interest, before the expiration of nine months, the plaintiff, within thirty days from the date of such payment, to reconvey to said defendants said premises, and appointing a commissioner to make such conveyance, in case of the failure of the plaintiff so to do. Defendants appeal.

The first, second and fourth assignments of error are based upon the ruling of the court in admitting the testimony of the witness Hitchcock in relation to the transfer by Taylor and Miles to the plaintiff of a claimed indebtedness due from defendants; and the third assignment of error is based upon the ruling of the court in permitting the witness Hitchcock to explain what he meant by speaking of Taylor and Miles as trustees in his cross-examination by defendants. It appears from the evidence that the title to the premises described in the deeds from

defendants and Thompson to Taylor and Miles was taken by Taylor and Miles as trustees, in trust, for the parties who, on the 24th day of March, 1881, as incorporators, organized the plaintiff corporation. The quitclaim deed from Taylor and Miles to plaintiff was made in execution of such trust. The real parties in interest in the transaction between defendants and Taylor and Miles were the incorporators of the plaintiff. There was no error in the rulings of the court upon these questions.

The facts set up by defendants for a second defense do not constitute an estoppel. The statements contained in the complaint, relied on as an estoppel, are not statements of matters of fact, but a statement of a legal conclusion drawn from facts. In the case set up the plaintiff and defendants in that suit each drew their conclusions from the same facts, and the plaintiff said the deeds conveyed an absolute title, and defendants then said that the deeds and agreement constituted a mortgage. There is no admission of a fact here to create an estoppel. *Thayer v. Arnold*, 32 Mich. 336, 341.

It is set up in defendants' answer, and urged in appellants' argument, that the plaintiff corporation is not authorized by its articles of incorporation to purchase mortgages. The question does not arise upon the facts of the case. The whole transaction, relating to these mining claims, shows the purpose of entering into it to be the acquirement of mines for the purpose of operating the same by such corporation. The deed from Taylor and Miles to plaintiff was made to effectuate the objects of such organization, and, under the circumstances of this case, there can be no question but that plaintiff was empowered by its articles of incorporation to do just what it did do.

Upon all questions of fact affecting the merits of this case there is no dispute. The deeds from defendants and Thompson to Taylor and Miles and the agreement between defendants and Taylor and Miles must be con-

strued together as one instrument in determining the rights of the parties thereunder. The plaintiff claims that the transaction between Taylor and Miles and the defendants was a loan by Taylor and Miles to defendants of the sum of \$12,000, and that defendants made the deed to Taylor and Miles, of the Lulu lode, and the White extension lode, as security for the payment of said loan. We think that the deed and agreement taken together show a loan and mortgage. The plaintiff prayed a foreclosure of this mortgage, by a sale of the mortgaged premises, but the court rendered a decree of strict foreclosure, and upon this point appellants say that the decree should not be sustained, because it is not prayed for, and because there are no facts stated in the complaint which would warrant the court in decreeing a strict foreclosure, and because it is contrary to the established practice and principles of courts of equity to grant decrees of strict foreclosure, unless a clear case therefor be made in the pleadings, and is well established by the proofs. The relief demanded does not limit the plaintiff in respect to the remedy which he may have. The court will disregard the prayer and rely upon the facts alleged and proved, as the basis of its remedial action. Pom. Rem. §§ 71, 83, 580, and cases cited; *Kayser v. Maugham*, 8 Colo. 232.

The facts alleged and proved clearly entitled the plaintiff to a decree of foreclosure and sale. To warrant a decree of strict foreclosure, where the practice permits such a foreclosure, the evidence should show that the interests of both parties require it. The bill of exceptions does not purport to contain all the evidence, and does not contain any evidence upon this question. This court cannot review the findings of the court below, upon which the decree is based, unless the bill of exceptions brings up the evidence upon which the findings are to be reviewed; and when this is not done, this court will assume that the evidence given was suffi-

cient to justify the decree. The decree in this case was made, and the argument upon the appeal based, upon the assumption that, under proper circumstances, the practice in this state permitted a strict foreclosure of a mortgage. We do not think a mortgage can be foreclosed without a sale of the mortgaged premises under a decree of foreclosure. Section 263 of the code of 1883 provides that "a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property, without foreclosure and sale, and the fact of a deed being a mortgage in effect may be proved by oral testimony; but this section shall not apply to trust deeds with power of sale." The "foreclosure and sale" must be a foreclosure and sale provided for in section 234 of the code. This is rendered clear by the exception of trust deeds from the requirements of section 263, which leaves no basis for a claim that foreclosure may be by sale without decree. The judgment should be reversed, and the court below directed to enter a judgment under the provisions of section 234 of the code, and in accord with the views herein expressed.

We concur: MACON, C.; STALLCUP, C.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the district court is hereby reversed and the cause remanded, with directions to enter judgment in accordance with the views expressed in said opinion.

Reversed.

CITY OF PUEBLO v. GRIFFIN.

Where it is sought to recover such damages as are not the usual and natural consequences of the wrongful act complained of, such damages must be specifically set forth.

Appeal from District Court, Pueblo County.

THE facts are stated in the opinion.

Messrs. CHAS. E. GAST and C. C. STEIN, for appellant.

Messrs. STONE and ANDERSON and C. A. LOTT, for appellee.

MACON, C. This was an action by appellee against appellant for the recovery of damages for personal injuries occasioned by a defective sidewalk in the city of Pueblo. In his complaint appellee alleged that the sidewalk was in a dangerous condition, to the knowledge of the city, and that in passing along it he received injuries which crippled him permanently, causing great bodily and mental suffering, and entailing an expense of \$50 for medical services, with loss of time in his business. Appellant answered, and put in issue all the material allegations of the complaint. On the trial appellee showed that at the time of his injuries he was keeping an eating-house in Pueblo, and, against appellant's objection, was permitted to show that he performed the labor of three men in his business, by reason of which his monthly profits therein amounted to from \$75 to \$100, clear of expense. Appellant duly excepted to the admission of this evidence. The jury returned a verdict against appellant for \$1,500. A motion for a new trial was filed by appellant and overruled, to which ruling exceptions were duly taken and an appeal to this court. Only one error is relied upon here, that based upon the admission of improper evidence.

The objection to the admission of the evidence should

10	366
17	568
10	366
4a	496
10	366
20a	359

have been sustained by the court below. The complaint is one for general damages only; such as the law will imply from the act or injury itself. The distinction between general and special damages is well understood in legal practice, and has frequently been defined by this court, as well as the pleadings applicable to the two classes of damages. The object of pleading being to apprise the opposite party of the nature of the claim or defense against him, as well as its extent, it is uniformly held that a statement of the injuries, with an averment of a sum as the damage, will authorize the recovery of such damages only as naturally and ordinarily follow from such injuries; but if from any peculiarity in the circumstances or situation of the injured party other loss accrued to him thereby, such peculiarity must be alleged and proven, to justify the recovery of such damages. In *Tucker v. Parks*, 7 Colo. 62, this court say: "Referring now to the extent of the recovery, we remark that damages may be general or special; and that, while an averment simply specifying the amount claimed, as in this complaint, is sufficient for the recovery of general damages, it is insufficient to warrant the recovery of special damages. Where it is sought to recover such damages as are not the usual and natural consequences of the wrongful act complained of, the rule is that they must be specifically set forth, that the defendant may have notice of the facts out of which they are claimed to have arisen, and that he may not be taken by surprise on the trial." A large array of other cases to the same effect might be cited, but the rule is so clearly stated in the case referred to that it is unnecessary so to do.

The testimony admitted, over the objection of appellants, went to show that, from the peculiar habits, skill and industry of defendant in error, he was able to earn more than if he had conducted his business on a more expensive scale, and had done the work of one man only,

and hired two others, which in his business he states it was usual to do; but by dispensing with the labor and expense of two men his profits were from \$75 to \$100 per month. Under his general averment, plaintiff might have shown what his business was, and its extent, together with his general ability to earn money. But it was inadmissible for him to show the profits of his business as a measure of damage. Proof of profits as a measure of damage, in cases in which they are recoverable, must be specially averred. In this case the profits of plaintiff's business, as shown by him, were not the result of the labor of plaintiff alone, but were, at least in part, composed of other elements, and from the uncertainties and fluctuating nature of such business could not be the basis for the estimation of damages in a case like this.

The point made by the defendant in error, that though there may have been error in admitting this testimony, yet the verdict might well have been rendered as one for general damages, and upon that ground would not have been excessive, is unsound. We cannot assume that the verdict was not influenced by the evidence given in the case, and certainly not that the jury were more circumspect in acting on the evidence than the court was in admitting it. For this error the judgment of the district court must be reversed.

We concur: RISING, C.; STALLCUP, C.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the district court is reversed and the cause remanded for a new trial.

Reversed.

SORENSEN V. TOWN OF GREELEY.

The granting of a right of way on a street for a railway by a municipality does not create any liability against the municipality for the damages occasioned by the corporation exercising the rights so granted. The liability in such cases is against the corporation exercising and enjoying the rights so granted.

Error to District Court, Weld County.

THIS was an action by plaintiff, Hans Sorensen, against the defendant, for \$284 damages for injury to his crop occasioned by the destruction of the flume and lateral conveying the water supply thereto. It appears from the evidence produced by plaintiff that in the spring of 1881 the plaintiff had a lease of three lots in the town of Greeley. These lots were on the east side of the Union Pacific Railway track, being the old Denver & Pacific Railway track, and the Mill-Power canal was on the west side of the track. The Mill-Power canal was a canal for conveying water for mill-power purposes, irrigation of land not within the town, and for land and lots within the town, and for household purposes for the people in the town of Greeley. The canal belonged to Bruce F. Johnson, with reserved rights in the town of Greeley for water for irrigation of the land and lots within the town, and for household purposes, for which the town had control of the canal, with right to assess the persons so using the water therefrom, and the plaintiff had right to water therefrom for the irrigation of said lots. In the spring of this year the plaintiff planted the said lots in garden vegetables, and, in order to get the water from the said canal to his lots, plaintiff took the same out of the canal on the west side of and near to the said railroad, and, with the aid of the section hands employed on the railway, he put a flume under the railway track, and then he ran a small lateral down the side of the track, a distance of two or three hundred feet to the lots, and so conveyed

the water to and irrigated his lots until the 26th day of July, when the railway company commenced work there to raise the railway track, and build a bridge at the place where plaintiff's flume was, and did so raise the track for some distance, and did so build a bridge at that place. The plaintiff's flume was destroyed on the first day of the work, as the work commenced at that point, and its destruction was thereby necessary. By this act, plaintiff's water supply for his lots was prevented from passing over that way, and, plaintiff failing to convey the water by any other way, his crop thereon suffered. On the 20th day of July, 1881, the defendant, the town of Greeley, passed an ordinance granting the right to said Bruce F. Johnson to change the course of the said canal, so as to occupy certain streets lying east of the said railway of the Union Pacific Railway Company and flume and lateral of the plaintiff. The place where the flume was, and where the bridge was built on the railway, under which the new canal ran, was on Jefferson avenue, and the railway of the Union Pacific Railway Company.

It also appears, from the evidence, that the force of men who raised the railway track and built the bridge were in the employ of the Union Pacific Railway Company; that this same force of men dug the new way for the said canal over the said streets, and commenced that work about one week after they had commenced raising the railway track; the section men and this force of men working under one superintendent the first week, and the said flume and lateral of plaintiff's being taken away by the said section men. The whole of said work occupied about thirty days. The old canal was not disturbed until after this work was done, but still continued to carry water therein. It appears from plaintiff's testimony that he could have taken water from the canal to his lots by another way, but that it would have cost him more than his crop was worth. The ordinance above re-

ferred to and another ordinance, which were read in evidence, are as follows:

“Ordinance No. 29. Vacating portions of Olive street and Washington avenue for the Mill-Power canal.

“Be it ordained by the board of trustees of the town of Greeley, state of Colorado:

“Section 1. That so much of the north half of Olive street, in the town of Greeley, state of Colorado, as lies between Jefferson avenue and Washington avenue, and so much of the east half of Washington avenue as lies between the south half of Olive street and the point of intersection of said Washington avenue with said Mill-Power canal as at present constructed, be, and the same is hereby, vacated.

“Sec. 2. Be it further ordained that Bruce F. Johnson is hereby authorized and empowered to change the course of his Mill-Power canal along the line of said Olive street and Washington avenue, and to occupy thereon the said Mill-Power canal upon said portions of said streets vacated by section 1 of this ordinance.

“Passed and adopted this 20th day of July, 1881.

“DANIEL HAWKS, Mayor.

“Attest: B. F. MARSH, Recorder.”

“Ordinance No. 27. Vacating a portion of Jefferson avenue, and granting the use of the said portion, and the right to lay down railroad tracks thereon, to the Greeley, Salt Lake & Pacific Railway Company.

“Be it ordained by the board of trustees of the town of Greeley, state of Colorado:

“Section 1. All that portion of Jefferson avenue lying between Maple and Vine streets, in the town of Greeley, save and except the following, to wit: Commencing at the southeast corner of block 38 in said town; running thence due east forty-eight feet to a point; and running thence in a north-northwesterly course along said avenue in a straight line to a point five feet and eight inches due east of the southeast corner of lot 1, block 23; running

thence due west to the southeast corner of said lot; running thence due south to the point of beginning,—be, and the same is hereby, vacated.

“Sec. 2. The use of that portion of Jefferson avenue which is vacated by section 1 of this ordinance, and the right to lay down railway tracks on said vacated portion of said avenue, is hereby granted to the Greeley, Salt Lake & Pacific Railway Company.

“Passed and adopted this 5th day of September, 1881.

“DANIEL HAWKS, Mayor.

“Attest: B. F. MARSH, Recorder.”

Which ordinances, on motion of defendant, were afterwards excluded from the evidence by the court.

Plaintiff offered to prove by Jacob Wolaver, who was one of the town board of trustees of the town of Greeley in 1881, and attended the meetings of the council, as follows: “The facts we expect to show by this witness are these: We expect to show that the railroad company wished to occupy and lay their track upon Jefferson street; that said street was then occupied by the old Mill-Power canal; and that the town agreed to vacate said street, and allow the railroad company to run upon it, and, in consideration thereof, the railroad company agreed to dig the new Mill-Power canal, running from Olive street on Washington avenue to intersect with the line of the old canal; and that, for the reason that the title to Mill-Power canal was in Bruce F. Johnson, power was given him, and he was authorized and empowered by the town, to change Mill-Power canal upon streets vacated for that purpose by the town; but that it was the understanding that Johnson was not to do the work, but that the railroad company agreed with the town to move said canal in consideration of the town giving them Jefferson street to lay their track upon; and that Johnson consented that the railroad company might move Mill-Power canal, by virtue of certain ordinances passed by the town council, offered to be introduced as

evidence in this case; and that the loss to Sorensen, the damage to his flume and lateral, was occasioned by the change made in the Mill-Power canal by the railroad company in consequence of this agreement between the town, the railroad company and Johnson; and that no records of any kind of this agreement between the town and the railroad company have been kept by the town council." All of which was rejected by the court on objection by defendant.

The plaintiff rested, and, on motion of defendant for nonsuit, the court granted the same, and rendered judgment accordingly against the plaintiff. The plaintiff, having duly excepted to the ruling and judgment of the court, to reverse the judgment brings the case here on writ of error. The assignment of errors goes to the rejection of the evidence offered and to the judgment.

Mr. J. E. GARRIGUES, for plaintiff in error.

Messrs. HAYNES, DUNNING and ANNIS, for defendant in error.

STALLCUP, C. Accepting all the facts admitted in evidence, as well as those excluded and rejected, the plaintiff is without right of recovery against the defendant, the town of Greeley, for the reason that the acts which stopped the flow of water by the way it was going to plaintiff's lots were the acts of the U. P. R'y Co., in the construction of a bridge upon its own premises. It is difficult to see any force in the facts shown by the ordinance of September 5, 1881, as it was passed long after the occurrence complained of, and purports to vacate a portion of Jefferson avenue, and to grant the right to the Greeley, Salt Lake & Pacific Railway Company to lay railway tracks thereon; while, from the evidence, it appears that a portion of this avenue was already occupied by the railway of the U. P. R'y Co., and that plaintiff's flume passed under this same railway, at a point on this

same Jefferson avenue; that the destruction of the flume was caused by the workmen and employees of the said U. P. R'y Co. in raising this same railway, excavating and constructing a bridge thereunder at this point. As to the other ordinance of July 20, 1881, it simply vacated a portion of certain streets lying east of this railway, and granted to Bruce Johnson the right to occupy the said portions so vacated with the said canal. It is nowhere shown or claimed that the town pretended to grant the right to occupy with the canal the ground occupied by the said railway of the U. P. R'y Co. and flume of the plaintiff. That Bruce Johnson had any right from the said railway company, or any other source, to cross the said railway with the said canal, at this or any other point, does not appear. It would seem that such right would have to come from the railway company, and it appears that the railway company did assent to the same by adjusting its railway to and in excavating for the canal thereunder. There was ample water in the old canal during all this time, so that in this respect the town discharged its duty.

In no view of the case can the town be held liable for the injury resulting from such disturbance of the flume and lateral of the plaintiff. The granting of a right of way on a street for a railway by a municipality does not create a liability against the municipality for the damages occasioned by the corporation exercising the rights so granted. The liability in such cases is against the corporation exercising and enjoying such rights. *City of Denver v. Bayer*, 7 Colo. 113. The judgment should be affirmed.

We concur: MACON, C.; RISING, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment is affirmed.

Affirmed.

CITY OF DENVER V. DEAN.

10	375
12	477
13	480
10	375
28	135
28	137

1. The municipal authorities of Denver must exercise ordinary care in keeping the sidewalks free from defects and obstructions, and liability may ensue from injuries occasioned by failure so to do.
2. Where a city did not construct the sidewalk, and the accident is not occasioned by any act of its officers or agents, before plaintiff can recover he must show that the corporation had notice of the defect causing the injury for a sufficient length of time prior thereto to enable it to cure the defect. Such notice may be actual or constructive.
3. The knowledge of an officer or agent, obtained in the line of his duty, is actual notice to the city.
4. Constructive notice exists where the exercise of ordinary care involves the anticipation of defects that are the natural and legitimate result of use and climatic influences. Such notice also exists where the city has had the means of knowledge for a sufficient time to have cured the defect.
5. The phrase "means of knowledge" is applicable only to visible defects or obstructions, except that it may include also a neglect to anticipate defects naturally arising from use and climatic influences.
6. It is the province of the jury to determine whether or not a certain officer had personal knowledge of the defect causing the injury, and also whether such knowledge was acquired a sufficient length of time previous to the accident.

Appeal from District Court, Arapahoe County.

IN August, 1882, the plaintiff, Cecil A. Deane, while walking along the sidewalk on Curtis street, Denver, in daylight, stepped upon the cap covering a coal hole, which tipped under his weight, allowing one leg to pass through, and causing an injury from which serious consequences followed. After suffering great pain for a considerable length of time, he lost almost completely the use of his leg for life. There was nothing in the appearance of the cap or cover to the coal hole, or its surroundings, to indicate danger to a casual or even careful observer. The defect which produced the injury was the failure to properly bolt or secure the cap on the under

side; a matter that would not be discovered except by a careful and minute examination, or by accidentally stepping on one edge of the cap in a particular way, as did Deane, and causing it to tip. The record shows that Deane, at the time of the accident, was exercising reasonable care and caution in passing along the sidewalk. The question of contributory negligence on his part is therefore not relied upon by counsel or discussed in the opinion. There is evidence tending to show that one Lomery, who at the time of the accident was, and for several months prior thereto had been, chief of police of the city of Denver, knew of the defective cap; also evidence tending to show that this knowledge of Lomery was acquired four or five months previous to the accident; that he notified the tenants and instructed them to have the defect cured; that he also mentioned the matter to a policeman whose beat was upon that portion of the street. It is not claimed that the city constructed the sidewalk in question or superintended its construction.

On the 26th of October following the accident, Deane brought this action against the city for damages, relying upon its alleged negligence in failing to have the cap properly secured. He recovered a verdict and judgment, from which judgment the present appeal was taken. The ninth instruction given to the jury by the trial court, which is discussed at length in the opinion, reads as follows: "The jury are instructed that the knowledge of a policeman or chief of police of the city of Denver is not the knowledge of the corporation of Denver, and, unless some other knowledge or notice of the defect in the street was proved, the plaintiff cannot recover. But this is not to be understood as an instruction on the part of the court that the knowledge gained by the chief of police of the city, in pursuance of his duties and employment as such officer, may not have been sufficient to have afforded the city of Denver the means of knowledge, so as to charge it with negligence if it disregarded such means of

knowledge." The remaining essential facts are sufficiently stated in the opinion.

Messrs. F. TILFORD, R. H. GILMORE, J. F. SHAFFROTH and J. C. STALCUP, for appellant.

Messrs. BROWNE and PUTNAM, for appellee.

HELM, J. It was the duty of the municipal authorities of Denver to exercise ordinary care in keeping the sidewalks free from defects and obstructions. The conclusion reached in *City v. Dunsmore*, 7 Colo. 328, with reference to streets, applies with equal fitness to the subject of sidewalks, and the reasons there given need not be restated. A failure to perform this duty might lay the foundation of municipal liability. But since the city did not *construct* the sidewalk, coal hole or cap here in question, and the accident was not occasioned by any act of the city, its officers or agents, before plaintiff could recover damages from it for the injury sustained, he was required to show that the corporation had notice of the defective cap; also that it was in possession of such notice a sufficient length of time before the accident to have cured the defect and prevented the injury. Such notice might have been either actual or constructive.

The ninth instruction given in the case announces two propositions on the subject of notice: *First*, that the knowledge, concerning defects like the one in question, of the police of the city, is not actual notice to the corporation; *second*, that such knowledge, if gained in pursuance of the officer's duties and employment, may be the means of knowledge, so as to charge the municipality with constructive notice. In our judgment both propositions are wrong. Whether a certain matter is in the line of a particular officer's employment is to be determined by construction of the statute or ordinance prescribing his duties; hence such determination is a question of law. Without discussion, but not without careful examination,

we are prepared to hold that the ordinance before us sufficiently charges the chief of police with the care of coal holes and caps, as well as other obstructions, in or upon the sidewalks. Hence the court below should have instructed the jury that, if the officer had personal knowledge of the defective cap, the city should be charged with *actual* notice; and that, if such actual notice existed for a length of time reasonably sufficient to have had the cap properly bolted before the accident, they might find for plaintiff, provided other essential questions of fact were, upon the evidence, resolved by them in his favor. But the knowledge of the chief of police could not, in and of itself, be *constructive* notice to the city; nor could the city be charged with this kind of notice by the communication of such knowledge to others. If information of a latent defect, possessed by the chief of police, were not acquired in the line of his official employment, but were communicated by him to some officer charged with the duty of repairing, or causing to be repaired, such defects, the notice to the city would be actual, and not constructive; while if, in such case, the chief repeated the information to private citizens, or to other officials whose duties, like his, in no way related to the matter, the city would in law be charged thereby with no notice at all, either actual or constructive. 1 Dill. Mun. Corp. note 1, § 237, and cases; note to *Bank v. Whitehead*, 36 Amer. Dec. 189; 2 Dill. Mun. Corp. § 1025, and notes.

There seem to be but two ways in which a municipal corporation can be charged with constructive notice of defects in its sidewalks so as to be held liable for injuries occasioned thereby; there being no municipal responsibility in the original construction, and no affirmative municipal acts through which the defects are produced: *First*. Where an exercise of ordinary care on its part involves the anticipation of defects that are the natural and legitimate result of use and climatic influences. A neglect of the proper officer to make a sufficiently frequent and

careful examination of a particular structure is sometimes held to charge the city with constructive notice, even though the defect be latent. Illustrating this kind of constructive notices are such cases as *Furnell v. City*, 20 Minn. 117, and *Rapho & West Hempfield Tps. v. Moore*, 68 Pa. St. 404, where the respective injuries resulted from decayed stringers under the sidewalk and rotten timbers in the bridge. The timbers were sound when put into the sidewalk and bridge, but both had been in use so long that decay might reasonably be expected. The defects in both instances were only discoverable by a skilled and careful inspection. It is not contended that the principle above stated, underlying this class of cases, is applicable to the case at bar. *Second.* Constructive notice also exists where the corporation has had the *means of knowledge* for a sufficient time to have remedied the defect. The finding of the jury for plaintiff in the case at bar must, under the ninth instruction, have been based upon the proposition that the knowledge of Lomery was means of knowledge to the city, and that the city was thereby charged with constructive notice of the defective cap. It may be that the phrase "means of knowledge" fairly includes cases of neglect to anticipate and prevent certain defects,—cases covered by the foregoing discussion; but, with that exception, we think the phrase applicable only to visible defects or obstructions,—defects or obstructions that are open and notorious; "*so notorious as to be observable by all.*" Shear. & R. Neg. §§ 148, 407, and cases; 2 Dill. Mun. Corp. note 3, § 1026, and cases; *Weisenberg v. City of Appellton*, 7 Amer. Rep. 43, note, and cases. Illustrating the inference of notice through "means of knowledge" are cases like that of *Dewey v. City*, 15 Mich. 306, where the injury resulted from an uncovered coal hole, and that of *Mayor v. Sheffield*, 4 Wall. 189, where it was caused by a stump left projecting through the sidewalk.

But it is conceded by both parties to this case that the

defect now under consideration was *latent*. In the undisputed language of the complaint, "there was nothing in the appearance of the coal hole or its surroundings to indicate danger to the most careful observer." Therefore, aside from the fact that the knowledge of Lomery as a city official could not be means of knowledge to the city, it cannot be said that there was anything *else* before the jury to constitute such means of knowledge.

We are not permitted to hold that the errors of the court in the ninth instruction were without prejudice to appellant. Though, under a proper statement of the law, the jury might perhaps have found the city charged with actual notice, it is not for us to say that such *must* have been their conclusion. It was their province to determine whether or not the chief of police did have personal knowledge of the defective cap; and also whether such knowledge, if found to exist, had been acquired a sufficient length of time previous to the accident. 2 Dill. Mun. Corp. § 1026. It does not necessarily follow, because the jury, under the law as submitted to them, found from the conduct and declarations of Lomery and others that the city had means of knowledge, and therefore *constructive* notice, that, under a proper instruction, they would have Lomery possessed of adequate information for a sufficient period to charge the city with *actual* notice.

For the errors mentioned, judgment must be reversed, and it is unnecessary to discuss the remaining assignments.

Reversed.

LONG V. HERR.

Leaving a description of property by the owner or his agent with a real estate broker, accompanied by a request to sell on terms and at a price designated, is a sufficient contract of employment.

Appeal from County Court of Arapahoe County.

PLAINTIFFS, Theodore W. Herr & Co., were real estate agents, doing business in the city of Denver. Defendant, William Long, was the owner of lot 9, block 21, East Denver, with improvements thereon, and undertook to sell the same. In 1881 he executed and delivered to plaintiffs the following writing:

“DENVER, COLORADO, July 26, 1881.

“I have this day placed in the hands of Theodore W. Herr & Co. for the period of three months, and until withdrawn by written notice, the following described property, viz., lot 9, block 21, E. D. Wazee, between 17th and 18th streets, six-room frame house, to be sold or exchanged by them at a price not less than twenty-five hundred dollars; they to have as compensation for their time, trouble, advertising, etc., all obtained over said price, and five per cent. commission; and I agree to make a perfect and unincumbered title to the property, at price agreed upon, when required. If sold or exchanged in the meantime without their agency, one-third of above compensation to be paid. Terms: \$2,000 may stand at ten per cent.

[Signed] “WILLIAM LONG, 279 Glenarm.”

(*Memoranda* in pencil:) “Sold September 8, 1881, to Welsh & Campbell, \$2,400. July 14, 1882, wrote postal.”

On the date mentioned in the writing the property was recorded on plaintiffs' books, which books were kept in their office for inspection by all persons desirous of purchasing city lots or lands. It was held for sale, and duly advertised by posting upon the bulletin board in front of the office. The undisputed testimony of the senior partner tends to show that it was also advertised by plaintiffs in one or more newspapers, and that several prospective purchasers were driven to and shown the premises by them, in the endeavor to make a sale thereof. On the 8th of September, 1881, being about six weeks after the

execution of the writing' aforesaid, defendant, through another agent, without the knowledge of the plaintiffs, sold the property. He neither paid nor offered to pay plaintiffs any commission; and when, upon accidentally discovering that the sale had been made, plaintiffs demanded of him such commission, he denied any liability therefor. Thereupon this action was brought before a justice, and, on appeal, judgment was given by the county court in plaintiffs' favor for the sum of \$41.67. From that judgment the present appeal was taken.

Mr. J. B. BROCKWAY, for appellant.

Mr. C. G. CLEMENT, for appellee.

HELM, J. Appellant contends that the evidence before us wholly fails to show any such employment of plaintiffs as entitles them to commission or compensation from defendant. Fitch, in his work on the subject of Real Estate Agency, at page 15, with reference to contracts of this nature, uses the following language: "It is not necessary that the employment should be in writing. The leaving a description of the property at the office of the broker by the owner or his agent, with a request to sell it on terms and at a price designated, is a sufficient employment." The doctrine thus stated seems reasonable, and is sustained by authority. The writing set out in the statement of facts preceding this opinion may not, technically speaking, itself constitute a contract of real estate brokerage between parties. It is nevertheless a written statement under the signature of defendant, admitting the existence of such a contract as defined by Mr. Fitch. We think that this contract was perfectly valid. The consideration for defendant's promise to pay the commissions mentioned was the services to be rendered, and the expense to be incurred, by plaintiffs, in their efforts to make a sale of the property. But, by the terms of the employment, if, during the three months

specified, and before written notice withdrawing the property from plaintiffs' hands, defendant himself, or another agent for him, disposed of it, he was to pay plaintiffs one-third of the amount to have been allowed them as commissions had they made the sale themselves. Counsel for defendant disputes this construction of the agreement, but we think the matter too plain for serious discussion. The skill and good faith of plaintiffs' efforts under the employment are not questioned. It appears that the property when sold brought less than \$2,500; therefore plaintiffs would be entitled to but one-third of five per cent. of that sum. This much we think defendant was clearly liable for, and so evidently thought the county court. The judgment is affirmed.

Affirmed.

HUGHES ET AL. V. FISHER.

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13a 192
f13a 316

1. A written indorsement upon the back of an order limiting the conditions of the order, and made before its present issue for acceptance, constitutes a part of the order.
2. A conditional acceptance of an order becomes absolute upon the happening of the condition.
3. A. accepted an order drawn by B. for \$115, the acceptance being conditional upon the receipt of money by A. coming to B. The proof showed that thereafter A. received \$2,000. *Held*, that the acceptance became absolute, there being no proof to show that the sum received was exhausted by orders previously accepted.
4. The promise to pay the debt of another out of moneys when received, belonging to that other, but to be paid the promisor, is not a promise to pay the debt of another within the meaning of the statute of frauds.
5. *Held*, that section 14 of the Civil Code, prior to 1887, related to practice before justices of the peace, and that under said statute it was no misjoinder of parties to include the maker and acceptor of an order as defendants in the same action.

Error to County Court, Pueblo County.

THIS action was brought by Fisher Bros. to recover from Hughes Bros. as acceptors, and from H. J. Coy as

drawer thereof, the amount specified in the following instrument:

“\$115.09.

DECEMBER 6, 1882.

“*Messrs. Hughes Brothers:* Pay to the order of Fisher Bros., freight advanced on stone, one hundred and fifteen dollars and nine cents. Charge to account of H. J. Coy. No. 46.”

On the back of the instrument was indorsed the following words, to wit: “This order to be paid on final settlement of stone-work on city hall, and charge to the account of Hardin & Ramsey.”

Hughes Bros. were sureties for Coy, who was a contractor and builder, upon a certain bond given by him in connection with his contract for the erection of the city hall of Pueblo. To protect them, all moneys due him under this contract were to be paid to them, and they were to disburse the same upon his orders. The instrument in question was duly presented to Hughes Bros., and by them verbally accepted, to be paid out of the moneys aforesaid. In the justice's court, on motion, the action was dismissed as to Coy. On appeal the cause was tried to the county court, a jury being waived, and judgment rendered against Hughes Bros. for the full amount named in the instrument. To reverse this judgment the present writ of error was sued out. The remaining facts essential to an understanding of the case sufficiently appear in the opinion.

Section 14 of the code, which receives partial construction, reads as follows: “Persons jointly or severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff.”

Mr. C. A. LOTT, for appellant.

HELM, J. The writing on which this action was brought, and the written indorsement upon the back thereof, made at the time it was drawn and before its presentation for acceptance, must be construed as constituting in law but a single instrument. 1 Daniel, Neg. Inst. § 79, cases. Thus viewed, it is to be regarded as a conditional order; the condition precedent to payment being the "final settlement of stone-work on city hall." The expression, "and charge to the account of Hardin & Ramsey," does not add to or alter the written condition so far as Fisher Bros. are concerned. As interpreted by the conduct and language of the parties themselves, it is a mere direction to Hughes Bros. for their guidance in keeping the accounts between themselves and Coy. But it is shown by uncontradicted testimony that in March, 1883, the final settlement referred to in the indorsement was made. Hence the instrument then became to all intents and purposes an unconditional order, and was therefore to be treated as such. The acceptance by Hughes Bros. was not in writing, but besides being subject to the written condition mentioned, it was itself conditional in another important particular. By the terms of this acceptance, the order was to be paid out of funds, if sufficient, due or to become due to Coy under his contract with the city; an arrangement having been made by which such moneys were to pass through the hands of Hughes Bros..

It appears that, after the final settlement above mentioned, at which time the order became unconditional, there was still coming to Coy, under the contract, \$2,500. It also appears that on April 23, 1883, Hughes Bros. received the sum of \$2,000 upon this balance of indebtedness. We think that the contingency of the acceptance is fairly shown to have happened. Having received \$2,000 in money belonging to Coy, after the instrument became in effect an unconditional order, it was the duty of Hughes Bros., under their acceptance, to pay this.

order, unless they could give a legal excuse for not doing so. Such, for instance, as that the whole of the \$2,000 was required to pay other unconditional orders accepted prior to the time of settlement for stone-work on the city hall. But no such excuse was offered.

In regard to counsel's objection that the acceptance of Hughes Bros., being verbal, is within the statute of frauds, and no liability attaches, we have this to say: The promise implied from the acceptance was not a promise to pay the debt of another, in the sense of the statute. It was a promise to disburse funds of that other upon his order, in a particular way; that is, Hughes Bros. agreed, from funds in their hands, or to come into their hands, belonging to Coy, to pay the debt of Coy, mentioned in the order. As the temporary custodian of his moneys, they agreed to pay to one of his creditors, upon the happening of a certain contingency, a specified portion thereof. The personal liability assumed by them was nothing, provided they acted in good faith with reference to their promise. Relying upon this promise the creditor refrained from otherwise pushing his claim against Coy; he left the order with Hughes Bros., and took no other or further steps in the premises. See *Putney v. Farnham*, 27 Wis. 189.

The proposition that there was a misjoinder of parties defendant, and therefore the action should have been dismissed, is without merit. Under section 14 of the Civil Code, it was perfectly proper to unite in one suit both the maker and the acceptor of such an instrument as the one before us. We cannot concede the correctness of counsel's assertion that this provision has no application to cases originally brought before justices of the peace. It is true, the code deals mainly with pleadings and practice in courts of record; but it is a mistake to assume that, prior to 1887, it in nowise affected actions before justices of the peace, or practice in justices' courts. *The act, prior to the year mentioned, related to "civil*

actions in the courts of justice" of the state. This language is clearly sufficient to cover legislation pertaining to justices of the peace and their courts. Several provisions — such, for instance, as sections 212 and 441 — expressly deal with this class of courts. A number of other provisions, such as section 14, above mentioned, which do not in words speak of justice courts, are broad and sweeping in their language, and were evidently intended to include proceedings in other tribunals besides courts of record. This objection might, perhaps, be overruled upon other grounds, but we deem the foregoing sufficient.

The assignment of error challenging certain testimony of the witness Byfield, offered to explain the meaning of the written indorsement upon the order, presents no fatal objection. Admitting that the court erred in receiving such testimony, it was error without prejudice. For, ignoring this evidence, and construing the instrument according to its plain and obvious significance, we have arrived at the same conclusion as did the court below. The judgment is affirmed.

Affirmed.

HARDING V. THE PEOPLE.

1. Except in the case of the agreement provided for in section 962, General Statutes, the law requires in all criminal cases that the jury return to and declare their verdict in open court.
2. The act entitled "An act to protect the public health and regulate the practice of medicine in the state of Colorado" (Gen. Stat. p. 773), *held* to be not in conflict with section 2, article IV, of the constitution of the United States, nor with that part of the fourteenth amendment which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."
3. With respect to the "title" of an act under section 21, article V, of the state constitution, the only requirement is that the title clearly express the subject of the act. The inhibition goes to "acts" containing more than one subject.

10	387
11	110
10	387
22	526
10	387
11a	367
10	387
26	318
28	361
10	387
16a	262
10	387
32	18

4. In the absence of any emergency clause, in view of the constitutional provision (sec. 19, art. V), the expression "after the passage of the act," as used in the law, can have but one meaning, namely: after the act goes into effect. In the construction of statutes, general terms are to receive such reasonable interpretation as leaves the provision of the statute practically operative.
5. The provisions of the act show beyond any question that the clear intention of the legislature was to require all persons desiring to practice medicine or surgery within this state to apply for and receive a certificate of qualification from the state board of medical examiners before they were authorized to do so.
6. Every law which imposes a penalty is not, legally speaking, a penal law; that is, a law which is to be construed with great strictness in favor of the defendant.
7. It is not necessary to negative an exception not embraced within the same clause that defines and creates the offense and which constitutes no part of the description of the offense. When an exception is contained in a distinct section it is a matter of defense.
8. If the statute creating an offense is silent concerning the intent, there need be no intent alleged.
9. *Mandamus* is the remedy when a board of examiners arbitrarily refuse an application for a certificate to practice.

Error to Criminal Court, Arapahoe County.

ELIZA J. HARDING was arraigned and tried on an information filed by the district attorney in the criminal court of Arapahoe county, in which information she was charged with unlawfully practicing medicine and surgery, without having received from the state board of medical examiners of the state of Colorado a certificate authorizing her to practice medicine and surgery in said state. The information contained two counts, the second of which charges her with unlawfully practicing medicine and surgery without having presented to the state board of medical examiners for verification a diploma from a legally chartered medical school, and without having furnished to said board other evidence conclusive of her being a graduate of a legally chartered medical school in good standing. In other respects the second count is like the first. The trial ended in conviction, and the imposition of a fine of \$100, and costs.

The defendant below brings the cause to the supreme court by writ of error. The further facts sufficiently appear in the opinion of the court.

Mr. MATT ADAMS, for plaintiff in error.

The ATTORNEY-GENERAL, for defendant in error.

ELBERT, J. It appears that after the jury in this case had retired to consider their verdict, the court adjourned until the following day; that during the adjournment the jury returned into the court room, and, in the presence of the judge and clerk, returned their verdict of guilty, and that thereupon the judge discharged the jury from further attendance in the cause, and, on the incoming of the court the following day, ordered the verdict to be recorded, and to stand as the verdict in the cause. We think this was error. The agreement of counsel, which was entered upon the minutes of the court, was limited to the one stipulation, viz.: "That the verdict herein may be received though the defendant be not present." It does not appear to have been made with reference to, and does not comply with, section 962, General Statutes, which provides "that, in every case of misdemeanor only, if the prosecutor for the people and the person on trial, by himself or counsel, shall agree, which agreement shall be entered on the minutes of the court, to dispense with the attendance of an officer upon the jury, or that the jury, when they have agreed upon their verdict, may write and seal the same, and, after delivering the same to the clerk, may separate, it shall be lawful for the court to carry into effect any such agreement, and receive any such verdict delivered to the clerk as the lawful verdict of any such jury." A similar provision in the statutes of Illinois has been held to allow the jury, its provisions having been complied with, not only to withdraw from the charge of the officer, but to seal their verdict and separate as an organized jury. *Reins v. People*, 30 Ill.

272. In the absence of the agreement provided for by this section, we know of no authority that authorized the judge to receive the verdict and discharge the jury during the adjournment. At common law, in trials for misdemeanors, a privy verdict was allowed, and there was no occasion for the presence of the defendant. 1 Chit. Crim. Law, 636. But a privy judgment only contemplated the separation of the jury until the meeting of the court, when their verdict was received in open court from the lips of the foreman, and recorded in the usual way. This finding in open court was what decided the rights of the parties, and was what was admitted to record. *Dornick v. Reichenback*, 10 Serg. & R. 90. Except in the case of the agreement provided for in the section to which we have referred, we think the law requires in all criminal cases that the jury return to and declare their verdict in open court. Whether, in cases not capital, the jury may not be allowed, upon agreement of parties, to deliver their verdict when found, to the judge or clerk, and separate until the incoming of court, is a question we are not to be understood to be deciding. *Reins v. People*, 30 Ill. *supra*.

For the foregoing reasons the judgment of the court below must be reversed and the cause remanded. Some of the other assignments of error present questions which will necessarily arise upon a new trial, and in that view we deem it advisable to notice them.

The act under which the plaintiff in error, the defendant below, was convicted, is entitled "An act to protect the public health and regulate the practice of medicine in the state of Colorado." Gen. St. 773. By its provisions, the legislature has attempted to protect the public from the evils arising from the practice of medicine and surgery by persons not qualified. No question is made respecting the general power of the legislature to pass acts of this character, nor can any question be made touching the wisdom and necessity of laws securing protection to

the public in this most vital matter. We do not see, as is claimed, that the provisions of the act are in conflict with section 2, article IV, of the constitution of the United States, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," or with that part of the fourteenth amendment which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

The act we are considering makes medical qualification the test of the right to practice medicine and surgery, and the field is open to all persons who possess the qualifications prescribed by the act. We find nothing in its provisions inconsistent with that rule of equality which the constitutional provisions we have quoted prescribe. Touching a like question, under a similar statute, it is said: "Under the provisions of the constitution of the United States, every citizen has the undoubted right to pursue any lawful profession, calling or employment, in a lawful manner; but these pursuits are always subject to such restrictions as may lawfully be prescribed by the legislature of each state in order to protect the public health and promote the general interests of society, and, as long as such restrictions leave the field open for every citizen of the United States who comes endowed with all the necessary qualifications to practice his profession, pursuit or calling, the law cannot be declared unconstitutional." *Ex parte Spinney*, 10 Nev. 336.

It is also urged that the title of the law contains two subjects of legislation, in contravention of section 21, article V, of the constitution, which declares that "no bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title. * * *" The objection is to two subjects in the "title," not to two subjects in the "act." The constitutional inhibition goes to "acts" containing more than one subject. With respect to the title, the

only requirement is that it clearly express the subject of the act. It is very clear that the act concerns but one subject of legislation, viz., the regulation of the practice of medicine within the state of Colorado. There is no union in the act of incongruous matters, having no necessary connection or relation, and the subject of the act is clearly expressed in the title. These were the two purposes the constitutional provision which we have quoted was intended to accomplish. It is true that the title expresses both the general and special character of the act; but we see no objection to this. It none the less clearly expresses the subject of the act.

Our attention is also called to section 5 of the act, which provides that "the state board of medical examiners, within ninety days after the passage of the act, shall receive through its president applications for certificates and examinations. * * *" In this connection we are cited to section 19, article V, of the constitution, which provides that "no act * * * shall take effect until ninety days after its passage, unless in case of emergency. * * *" In the absence of any emergency clause, in view of this constitutional provision, the expression "after the passage of the act," as used in the law, can have but one meaning, namely, after the act goes into effect. In the construction of statutes, general terms are to receive such reasonable interpretation as leaves the provision of the statute practically operative. *Electro-Magnetic M. & D. Co. v. Van Auken*, 9 Colo. 207.

The objection made in this connection to the regularity of the appointment and organization of the board need not be considered. It is enough that the board was *de facto* the state board of medical examiners, acting under the provisions of the statute, and that its certificate would have protected defendant from prosecution under the statute.

It is claimed that the act nowhere prohibits the practice of medicine without a certificate from the board of med-

ical examiners. This objection appeals alone to the letter of the law. The provisions of the act show beyond any question that the clear intention of the legislature was to require all persons desiring to practice medicine or surgery within the state after its passage to apply for and receive a certificate of qualification from the state board of medical examiners before they were authorized to do so. This is the essential requirement of the statute, and all its provisions are substantially to this end.

Section 4 of the act declares that every person practicing medicine in any of its departments shall possess the qualifications required by this act. Whether a person possesses the qualifications required can be determined only in one way, viz., in the mode prescribed by the statute, and can be proven only in one way, viz., by the evidence prescribed by the statute. The provisions respecting the mode of determining this fact, and the evidence of the determination are exclusive. The party wishing to practice must appear before the state board of medical examiners established by the act, must present the requisite diploma or stand the examination prescribed. If his diploma or his examination, as the case may be, is satisfactory to the board of examiners, they "shall issue their certificate in accordance with the fact," "and the holder of the certificate shall be entitled to all the rights and privileges mentioned in the act." Until he does this, he is without the requisite and only admissible evidence that he possesses the qualifications required by the act, so as to entitle him to practice medicine within the state, and cannot say that he has complied with the provisions of the act.

This is not a law which comes within the rule that penal laws are to be construed strictly. Justice Story says: "In one sense, every law imposing a penalty or forfeiture may be deemed a penal law. In another sense, such laws are often deemed, and truly deserve to be called, remedial." The judge was therefore strictly ac-

curate when he stated "that it must not be understood that every law which imposes a penalty is therefore, legally speaking, a penal law; that is, a law which is to be construed with great strictness in favor of the defendant. Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in the strict sense, penal acts, although they may inflict a penalty for violating them. * * * It is in this light I view the revenue laws, and I would construe them so as to most effectually accomplish the intention of the legislature in passing them." *Taylor v. U. S.* 3 How. 210. This is the enlightened and reasonable rule by which the act we are considering is to be interpreted.

Section 20 provides "that nothing in this act shall be construed to prohibit gratuitous services in case of emergency." It was not necessary, as is claimed, to negative this exception in the information against the defendant for a violation of the provisions of the act. The exception is not embraced within the same clause that defines and creates the offense, and constitutes no part of the description of the offense. It is contained in a distinct section, and is matter for defense. 1 Whart. Crim. Law, § 378; *State v. Barker*, 18 Vt. 195.

Nor was it necessary to allege any criminal intent. The rule is that, if the statute creating the offense is silent concerning the intent, there need be no intent alleged. Bish. Crim. Proc. § 523.

The points which we have decided are believed to cover all the important assignments respecting the admission or rejection of evidence and the giving and refusing of instructions. The court below tried the case substantially upon the view of the law which we have presented. The evidence showed that the defendant was engaged in the practice of medicine by the administration or application of electricity as a curative agent, and without having first obtained a certificate from the state board of medical examiners as required by the act. If it be true

that the board of examiners arbitrarily refused her application for a certificate to practice, her remedy was *mandamus*. *Deitz v. City of Central*, 1 Colo. 332.

For the error we have discussed in the first part of the opinion the judgment of the court below must be reversed and the cause remanded.

Reversed.

JENNINGS ET AL. V. RICKARD.

1. The partnership relation is a trust relation, and the members of a copartnership are held to a strict rule of good faith and fair and open dealing. He who assumes the relationship invites the confidence of his copartners and pledges fidelity to the interests of the copartnership.
2. Plaintiff, being a partner with defendants, by the terms of the partnership was to have one-third interest in claims located by defendants. The partnership was dissolved in the spring of 1878. One of the defendants, while prospecting some years prior to 1879, discovered some "float" on the mountain-side, where a valuable mine was afterwards discovered, and stuck a stake there, with a view of returning at some future time and discovering the vein from which it came, but did not return until after 1879. *Held*, that while the failure to pursue the search might have been neglect on his part, it was not fraudulent as of course.
3. The defense of the statute of limitations is in the nature of a special privilege, and, if not specially pleaded, must be treated as waived. It cannot be considered for the first time in this court. Nor can it be considered under the general objection that the complaint does not state facts sufficient to constitute a cause of action.

Error to District Court, Fremont County.

THE defendant in error obtained a decree from the court below for \$20,200. The plaintiffs in error, the defendants below, bring the cause to the supreme court by writ of error. The facts of the case are sufficiently stated in the opinion of the court.

Messrs. TELLER and ORAHOD and J. M. WALDRON, for plaintiffs in error.

Messrs. WELLS, SMITH and MACON, for defendant in error.

ELBERT, J. Charles Rickard, the plaintiff below, on the 18th of December, 1882, filed his bill of complaint against the defendants, John and Daniel Jennings, claiming a decree against them for \$20,200, on account of certain partnership transactions. He alleges that in the fall of 1874 he and the defendants entered into a mining copartnership for the purpose of collecting mineral specimens, and also for the purpose of discovering, locating and developing lodes and mining properties; that by the terms of such copartnership agreement Rickard was to furnish certain moneys, horses, wagons, etc.; that the defendants were to do the active work in the field in prospecting and locating mining claims, and that each were to have a one-third interest in all mining claims discovered and located by the defendants; that this copartnership continued until April, 1878; that during this time the defendants discovered and located the Mammoth, the Empire and the Trail lodes, and a certain claim to coal lands, and reported the same to plaintiff as properties belonging to the copartnership; that they reported the aforesaid lodes as being all that had been discovered, located and claimed by them during the continuance of the copartnership agreement. He alleges that on the 19th of March, 1878, he conveyed to said defendants, for the sum of \$400, all his interest in and to the foregoing copartnership properties. Concerning this conveyance of the 19th of March, 1878, he alleges a distinct and separate fraud upon the part of defendants Jennings, by reason of which he is entitled to a decree against them for \$200. This fraud concerns properties admittedly belonging to the copartnership, and will be considered first.

Under the terms of the copartnership, the lodes were located for convenience in the names of the defendants, and they were authorized to negotiate and sell them, ac-

counting to plaintiff for one-third of the proceeds. The evidence clearly shows that on or about the 19th of March, 1878, the defendants approached the plaintiff concerning a purchase of his third interest in the foregoing copartnership properties, and that the negotiation resulted in the sale by plaintiff to defendants of his third interest in the same for the sum of \$400, which he then and there conveyed by deed of that date to defendants. It also quite clearly appears that at the time of this sale the defendants were negotiating a sale of the copartnership coal claim to one Smith for the sum of \$1,800. Although this sale to Smith was not consummated until some time thereafter, the deed to Smith, which was placed in escrow, bears date March 19, 1878, the date of the conveyance by the plaintiff to defendants on his one-third interest in the copartnership properties. The one-third interest of the plaintiff in the proceeds of the sale of this coal mine would have amounted to \$600 — \$200 more than the defendants paid him for his entire interest in the four claims.

The partnership relation is a trust relation, and the members of a copartnership are held to a strict rule of good faith and fair and open dealing. He who assumes the relation invites the confidence of his copartners, and pledges fidelity to the interests of the copartnership. The requirements of the copartnership relation which the defendants sustained to the plaintiff demanded that, at the time of the negotiation for a sale of his third interest in the copartnership properties, they should have made known to him the negotiation which was then pending with Smith for the sale of the coal claim for the sum of \$1,800. Their concealment of this negotiation from the plaintiff was the concealment of an important fact, affecting the value of plaintiff's copartnership interest for which they were negotiating. It enabled them to deal with him on unfair and unequal terms. It was a fraud, and equity and good conscience required that defendants

should account to plaintiff for one-third of the proceeds of that sale.

The sale by plaintiff to defendants of his one-third interest in the copartnership properties, to wit, the Mammoth, the Empire and the Trail lodes, and the coal claim, was a sale in gross for \$400. The consideration paid for each property respectively does not appear. As the plaintiff introduced no evidence upon this point, and only prayed in his bill of complaint that the defendants be decreed to account for the sum of \$200, the difference between the entire consideration paid him for the whole property and his third interest in the proceeds of the sale of the coal claim, the court was justified in limiting its decree in this behalf to that sum.

Secondly. The plaintiff alleges another and distinct fraud respecting certain mining properties, which he claimed belonged to the copartnership, a claim which the defendants contest. Plaintiff alleges that, during the continuance of said copartnership agreement, the defendants discovered and located certain other mining claims, viz., the Cliff, the North Star, the Hiawasse, the Galena, the East Wing, the Buckeye, and the Sylvanite; that under the terms of their copartnership agreement he was entitled to a one-third interest in the same, but that the defendants fraudulently concealed from him the discovery and location of said claims, and that he never knew of the existence of said claims, or of his rights therein, until on or about the 27th day of September, 1879, when the defendants sold and conveyed said claims to one Balentine for the sum of \$60,000. By reason of this fraud upon the part of defendants, the plaintiff claims a decree for \$20,000, one-third of the proceeds of said sale to Balentine.

The defendants, in their answer, deny the copartnership, except as thereafter stated, and "thereinafter" they say "that they, the defendants, further answering, admit that they entered into an agreement with plaintiff

to gather specimens and prospect for lodes, substantially as set out in the complaint, and that such agreement continued until the early part of the year 1878." They set forth the sale and deed of the 19th of March, 1878, by plaintiff to defendants, and say "that, upon the completion of such sale by plaintiff to defendants, it was then and there agreed by and between them that all former associations, agreement, copartnership and business relations theretofore existing between plaintiff and these defendants should cease, and the same were then and there fully dissolved and terminated." In view of the testimony, as will be seen, this is an important admission. They deny any fraudulent concealment of lodes discovered and located as alleged in the complaint, but claim that the Mammoth, the Empire, the Trail lodes, and the claim to coal lands, reported by them to plaintiff as copartnership properties, were all the lodes discovered and located by them during the continuance of the copartnership, from the fall of 1874 to the spring of 1878.

Upon the admissions of the defendants in their answer and testimony, the Cliff, the Hiawasse, the Galena and the North Star must be treated, without hesitancy, as properties belonging to the copartnership. The defendants, in their answer, admit that the copartnership formed in 1874 continued until the spring of 1878. The copartnership must be treated as extending to all mining properties discovered and located by the defendants during that period, in the absence of any limitation. John Jennings admits in his testimony that the four lodes named were discovered and located in 1876 and 1877. The defendant, Daniel Jennings, while he does not testify upon this point, does not in any way controvert or disclaim it. It is true that they both claim in their testimony that they understood that the copartnership was dissolved in the spring of 1876, when the copartnership "specimen store" was sold; but this testimony does not support the allegations of the answer, the admissions of which, upon this point, must be held to control.

It appears from the testimony that these four mines belonged to the group of ten which were sold to Ballentine for the sum of \$12,000. There is no evidence fixing the separate value of the mines which constitute this group. In the absence of any evidence upon this point, the respective mines constituting the group must be treated of equal value. In so far, therefore, as the decree of the court below was based upon the right of the plaintiff to recover one-third of the proceeds arising from the sale of the Cliff, the Hiawassee, the North Star and the Galena is concerned, we think it is justified by the pleadings and the evidence.

It appears that three other mines which plaintiff claims belong to the copartnership, viz., the Sylvanite, the Buckeye, and the East Wing, were at the same time, namely, on the 27th of September, 1879, conveyed to Ballentine by a separate deed, and that the true consideration therefor was \$48,000. This sum, together with the \$12,000 for which the other group sold, constitutes the \$60,000, for the one-third of which plaintiff claims a decree.

It remains, therefore, to determine whether, upon the evidence, these three mines belonged to the copartnership. The two Jennings and other witnesses testify positively to their discovery and location in 1879, after the copartnership had been admittedly dissolved. It appears that the Sylvanite was by far the most valuable of the three; that the other two were not regarded as of much value. (There was an effort upon the part of the plaintiff to show that, while the Sylvanite was not located until 1879, it was really discovered by the Jennings during the existence of the copartnership, and its discovery fraudulently concealed from the plaintiff. Daniel Jennings admits in his testimony that some years prior to 1879, while prospecting, he discovered some "float" upon the mountain-side some four or five hundred feet from where the Sylvanite was afterwards discovered, and that he stuck a stake there to indicate the

locality, with a view of returning at some future day to prospect for the vein from which it came, but that he never did return to renew his search until 1879. Other witnesses testify to substantially the same admission on his part. At the worst, this was but a neglect upon his part to pursue a search that might have terminated beneficially to the copartnership. His failure to do so, however, does not appear to have been fraudulent. It is not shown that, at the time he stuck the stake where he found the "float," he discovered the vein from which it came, or that he had any knowledge respecting it that would render his failure to make further search for the mine fraudulent. Such and other indications of the existence of mineral veins are frequent in the path of the prospector. All that can be required of him is that he pursue his search with diligence and good faith. His failure to follow up a particular "float," or other indication of a lode, is not a fraud as of course. It will not do to say, under the circumstances of this case, that Jennings, after the dissolution of the copartnership, could not return to and prospect in Elk Mountain district for other lodes, except at the peril of having to yield to plaintiff a one-third interest in their discoveries, upon the proposition that by proper diligence they might have discovered such lodes during the existence of the copartnership. The evidence does not show the fraudulent concealment of a discovery, as in the case of the other group of mines.

In so far, therefore, as the decree of the court below was based upon the rights of the plaintiff to recover one-third of the proceeds arising from the sale of these three mines, we do not think it justified by the evidence.

The argument that the action is barred by the statute of limitations cannot be considered. The objection is taken for the first time in this court. The defense was not interposed in the court below, by either demurrer or answer. This defense is in the nature of a special privilege, and if not specially pleaded must be treated as

waived. It cannot be considered under the general objection that the complaint does not state facts sufficient to constitute a cause of action. *Hexter v. Clifford*, 5 Colo. 173; *Chivington v. Colorado Springs Co.* 9 Colo. 600.

The decree of the court below is reversed and the cause remanded.

Reversed.

STEVENS V. ANDREWS.

Plaintiff sued on a due-bill for money borrowed, and for \$5 for work and labor. Defendant admitted owing \$3 for labor, claimed that the due-bill was for money on deposit with him, and for counter-claim alleged that plaintiff occupied a certain dwelling-house by his permission, and had never paid for the same, but did not allege any right or interest in the house entitling him to demand rent. Plaintiff waived his claim for more than \$3 for labor. *Held*, that a demurrer to the counter-claim was properly sustained, and that plaintiff was entitled to a judgment on the pleadings.

Appeal from District Court, Ouray County.

THIS action was commenced by the appellee, Andrews, against the appellant, Stevens, to recover the sum of \$155.82, borrowed money, evidenced by a due-bill executed by Stevens, and payable to Andrews on demand, dated September 26, 1881, credited with \$51.50, leaving \$134.32 due Andrews, as he alleges. For a second cause of action Andrews claims \$5 due him for work and labor. Stevens, in his answer, denies owing Andrews any borrowed money; says the due-bill was given for money remaining in his hands on deposit. Admits that he owed the plaintiff for work and labor done in the sum of \$3. For a counter-claim against the plaintiff, the defendant alleges that the plaintiff occupied a certain dwelling-house by permission of the defendant from the 2d day of July, 1881, until the 8th of November, 1882. That the use of said premises for said period was reason-

ably worth \$5 a month, or the total sum of \$142.50. That the plaintiff has never paid the same, and admits judgment for the sum of \$35.18, with interest. The plaintiff demurred to that part of the answer setting up a counter-claim, which demurrer was sustained by the court. The defendant elected to stand by his answer, and the plaintiff having waived his claim for more than \$3, the amount admitted to be due him by defendant's answer for work and labor, thereupon the court rendered judgment for the plaintiff on the pleadings. The defendant, Stevens, appeals to the supreme court.

Messrs. ENOS MILES and WM. STORY, for appellant.

ELBERT, J. The demurrer to that portion of the answer setting up a counter-claim was properly sustained. The answer did not allege or disclose any right, title or interest in the defendant to the house alleged to have been occupied by the plaintiff, entitling him to demand or recover rent for the same.

The answer of the defendant respecting the due-bill sued upon did not put in issue any material fact respecting it, and the plaintiff having waived his right to recover more than was admitted by the defendant to be due the plaintiff on his claim for work and labor, the court did not err in entering judgment upon the pleadings. The judgment of the court below is affirmed.

Affirmed.

DENVER CIRCLE R. CO. v. NESTOR.

1. The act of February 10, 1883, section 8, providing that in all civil cases, both at law and in equity, the superior courts shall, within the cities and towns for which they are created, have concurrent jurisdiction with the district court, and that the proceedings, practice and pleadings therein shall be the same as in the latter court, is not in violation of article 5, section 24, of the state constitution.

10	403
10	426
10	427
10	428
11	61
11	250
10	403
13	508
10	403
20	17
10	403
21	114
10	403
25	181
10	403
27	280
10	403
30	109
10	403
36	117

2. Under act of February 10, 1883, section 3, prescribing the jurisdiction and practice of the superior courts, it is proper for the clerk of said courts, upon the failure of the judge to appear on the first day of the term, to adjourn the court from day to day, in accordance with the practice of the district court.
3. Under the Revised Statutes, 1868, page 619, section 5, by the dedication to the city of Denver of the streets of an addition thereto, platted in accordance with the provisions of the statute in force in May, 1876, the said city acquired only a qualified fee therein, in trust for the public for the *ordinary* and *necessary* purposes to which the streets of a city are usually subjected.
4. The charter of April 7, 1874, of the city of Denver, giving to the city council power to control its streets, to regulate the construction and operation of street railways, and the running of locomotive engines and cars, and the location and construction of railroad tracks within the city, does not confer upon the council such authority to license the construction of railroad tracks lengthwise of its streets and thoroughfares generally, as to charge the purchasers of abutting property with notice that they may be so used by railroad companies for the running of their trains, in common with every other mode of conveyance.
5. Under the authority of the charter of April 7, 1874, of the city of Denver, defining the powers of the city council with regard to the railroads within the city, and Revised Statutes, 1868, page 619, section 5, limiting the city's title to the streets dedicated to it, to a qualified fee, the license given by the city council to a railroad company to construct a track and run its trains lengthwise of a street of an addition is an appropriation of such street to an extraordinary use, not within the contemplation of the act of dedication, nor authorized by any legislative sanction for general application throughout the city, and cannot afford immunity from liability for actual injuries thereby resulting to the property of abutting owners.
6. An action was brought by an owner of property abutting on one of the streets of a certain addition to the city of Denver, to recover damages for injuries done to his property by a railroad company in constructing a road and running its trains the length of the street in front of his premises. *Held*, that since the injuries to the property were done after the state constitution went into effect, its provisions in regard to compensation for the taking or damaging of private property for public or private use may properly be invoked in aid of recovery.
7. A failure to reply to matters set up as a defense to an action is an admission of the truth of the facts alleged, but *not* of the legal conclusions deduced therefrom.

HELM, J., concurring specially.

Appeal from Superior Court of Denver.

THE complaint alleges damages done to appellee's property, consisting of two lots with dwelling-house and other improvements thereon, abutting on a street called "Willow Lane," in Witter's first addition to the city of Denver, by the construction of appellant's railroad track, and the running thereon in said street of its trains of cars propelled by steam-engines. The injuries and annoyances complained of are the excavation and obstruction of the street in front of appellee's property, so as to prevent ingress and egress to and from the same, casting upon and invading the premises with dirty steam, live cinders, dust and smoke, disturbing appellee and his family day and night by the noise of the cars, and the whistles and bells of the engines, by reason whereof the safety of his property was put in danger, its convenient and comfortable enjoyment interrupted and impaired, and its value greatly diminished. A question of jurisdiction is raised here, it being claimed that the superior court was wholly without jurisdiction, under the law and the constitution, to entertain the cause. The main ground of defense relied upon aside from the question of jurisdiction is that said Witter's addition was dedicated to the city of Denver before the state constitution went into effect, and under the statutes then in force the title to the streets was thereby vested in the city in fee-simple; that the city charter, granted prior to the adoption of the constitution, empowered the city to authorize and license the construction of steam railroads in all the streets of the city, and that the city did license the defendant, by an ordinance duly enacted, to grade said street, and to lay down its track, and operate its railroad therein. It was also alleged in this connection that the established grade of the street was not altered; that appellant operated its road with care, and that the license of the city afforded it complete immunity from liability for damages

on account of the construction and operation of its road. These matters were set up in the third defense, and no reply was filed thereto. The appellant not appearing at the trial, the case was tried by the court without a jury, and the judgment rendered in favor of the appellee.

Messrs. J. P. BROCKWAY, E. L. JOHNSON and C. E. GAST, for appellant.

Messrs. BROWNE and PUTNAM, for appellee.

BECK, C. J. The first and fifth assignments of error attack the jurisdiction and practice of the superior court. The first alleges that the court did not have jurisdiction of the subject-matter of the action; the fifth is to the effect that no term of said court existed at the time of the trial below, in October, 1884, the September term having lapsed for failure of the judge to appear on the first day of the term; that the practice provided by law for the district courts, in such cases, not being applicable to said superior courts, the clerk thereof was without any authority to adjourn the court from time to time, as he did, until the appearance of the judge. In the discussion of these assignments, appellant's counsel take the position that the superior court was never constitutionally clothed with any jurisdictional practice whatever. In support of this proposition it is argued that the act creating superior courts, and prescribing their powers, proceedings and practice, is in direct conflict with the provisions of section 24, article 5, of the state constitution, and therefore null and void. The legislative act in question is entitled "An act to provide for the creation and organization of superior courts in cities and incorporated towns; to prescribe the jurisdiction, powers, proceedings and practice of such courts, and to define the duties and qualification of the judges and other officers connected therewith." This act is composed of twenty sections, the jurisdiction and practice of said superior courts being defined in sec-

tion 3, which reads as follows: "Section 3. Such superior courts shall have original and concurrent jurisdiction within the limits of the several cities and incorporated towns for which they are created with the district courts of the state in all civil causes, both at law and in equity, and such appellate jurisdiction in such causes as is provided by law for the district courts, and shall be governed in all proceedings, with reference to practice and pleadings by the laws now or hereafter to be enacted for the district courts. All process issued out of the superior court shall be issued and served in like manner as similar process is issued and served from the district courts of the state." Additional appellate jurisdiction and power to regulate the practice and proceedings in other respects, not provided by law, is given in other sections. The provisions of the constitution with which the section quoted is supposed to conflict, being section 24, article 5, are: "No law shall be revived or amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended or conferred, shall be re-enacted and published at length." The first proposition is: the act violates that clause of the preceding section which prohibits the amending of laws without publishing at length the portion amended. A single reading of these provisions of the statute, and of the constitution, might seem, at first view, to sustain the proposition of counsel, but a careful examination of the subject, with a view to ascertain the object of the requirements, and a consideration of the consequences which would result from adopting the interpretation contended for, will show that the views of counsel cannot be sustained. Counsel is mistaken in saying that the act of the legislature in question is a direct attempt to amend all the laws relating to the district courts. It does not in terms assume to amend or change in any particular any law whatever. The declaration that the superior courts shall have original and concurrent

jurisdiction in civil cases with the district courts of the state, within their territorial limits, is a reference to the constitution for such jurisdiction. Article 6 of that instrument confers this jurisdiction on district courts, and it is to be found nowhere else. It would seem to be an irrational construction of a constitutional provision to require the legislature, whenever it becomes necessary, in the passage of laws, to refer to that instrument for powers or procedure to execute a law, to go through the idle and senseless form of re-enacting and publishing at length the constitutional provision referred to. The appellate jurisdiction of the district courts, and the provisions concerning the practice and pleadings of said courts, are to be found in the General Statutes. And while no direct attempt was made to amend these statutory provisions by the passage of the act in question, the legal effect is an amendment thereof by implication. Amendments of this character are not within the constitutional provision which requires so much of the act as is amended to be re-enacted and published at length. Cooley, Const. Lim. 181.

But our attention is directed to another provision of said section 24, viz.: "No law shall be * * * extended or conferred by reference to its title only, but so much thereof as is * * * extended or conferred shall be re-enacted and published at length." This is a provision not usually found in constitutions. Considered and construed in connection with the rest of the section in which it appears, and with reference to other portions of the constitution relating to the same subject-matter, it is a wholesome provision. It is well understood by the profession that certain constitutional provisions, and especially those of sections 24 and 25 of the legislative article, and section 28 of the judiciary article, were designed to remedy and prevent well-known abuses of legislation existing at the time of the framing of this instrument. These were the evils of special legislation, and the vicious practice of amending statutes by referring to the title,

and then declaring that certain words and phrases appearing in certain lines and sections be stricken out, and certain other words and phrases inserted therein. The clause of section 24, last quoted, goes further than the clause previously considered, and extends to cases of amendments by implication. They were not intended, however, to apply alike to all legislative enactments, including those wherein a reference to the general laws becomes necessary for the means of enforcing and carrying their provisions into effect. Such an unrestricted interpretation is not admissible, because it would be an unreasonable construction, and one that would impose upon the people more serious evils than those sought to be cured or avoided by the several sections and clauses of the constitution referred to. We recognize the force of the maxim that if the natural signification of the words employed involves no absurdity, the meaning apparent upon the face of the constitution is the only one intended to be conveyed, and that it is not lightly to be inferred that any portion is so ambiguous as to require extrinsic construction. We also indorse the salutary rule that the argument *ab inconvenienti* is not to be permitted to influence the courts to defeat by construction a constitutional mandate. It is not our purpose to defeat but to enforce the mandate in question, and to enforce it according to its reason and spirit, and the causes which led to its enactment. We agree with Judge Story that no construction of a constitutional provision is to be allowed which plainly defeats or impairs its avowed objects. "If there are," says that eminent jurist, "words which are fairly susceptible of two interpretations, according to their common sense, the one of which would defeat one or all of the objects for which it was obviously given, and the other which would promote all, the former interpretation ought to be rejected, and the latter held to be the true interpretation." Story, Const. § 428. All the authorities agree that where the words employed are

capable of a construction which involves a manifest absurdity, it should not be adopted, but the intent, if it be properly ascertainable, is to govern. To this end resort may be had to the prior state of the law for the purpose of ascertaining the mischief designed to be remedied or the object sought to be accomplished. With Judge Cooley we hold that a reasonable construction is what the constitution demands and should receive; that the real question is what the people mean, and not how meaningless their words can be made by arbitrary rules. Cooley, Const. Lim. 74.

That the construction contended for involves not only an absurdity, but the most serious evils, a little reflection will show. The manner and forms of proceeding for executing laws on general subjects of legislation are all provided in the General Statutes of the state. Ordinary subjects of legislation are dealt with at every session of the general assembly, and reference to the General Statutes is often necessary for the means by which they are to be carried into effect. To re-enact and publish at length these various forms and proceedings on the passage of such acts would serve no useful purpose whatever. Take, for example, an act imposing a tax upon a new subject of taxation; to require the legislature to ingraft on such an act the numerous details of proceeding and forms provided by the revenue laws for the valuation of property, the levy of assessments and collection of taxes, would be as useless as it would be senseless, expensive and oppressive. Considering the many subjects of legislation, concerning which the machinery for executing the law of the legislature is already provided, the consequences of enforcing the constitutional provisions under the construction here contended for would be far-reaching and serious. The bulky proportions which the laws would soon attain would be of itself an intolerable evil. In this connection the remarks of Judge Cooley on the subject of amendments by implication are in point. Sec-

tion 25, of article 4, of the Michigan constitution, provides that "no law shall be revised, altered or amended by reference to the title only, but the act revised, and the section or sections altered or amended, shall be re-enacted and published at length." Judge Cooley, in a learned opinion in *People v. Mahaney*, 13 Mich. 481, held that amendments by implication were not within the purview of the above section. Among other reasons assigned are the following: "If, whenever a new statute is passed, it is necessary that all prior statutes modified by it by implication should be re-enacted and published at length as modified, then a large portion of the whole code of laws of the state would be required to be republished at every session, and parts of it several times over, until, from mere immensity of material, it would be impossible to tell what the law was. If, because an act establishing a police government modifies the powers and duties of sheriffs, constables, water and sewer commissioners, coroners, mayors and justices, and imposes new duties upon the executives of the cities, it has thereby become necessary to re-enact and republish the various laws relating to them all as now modified, we shall find, before the act is complete, that it not only embraces a large portion of the general laws of the state, but that it has become obnoxious to the other provisions referred to, because embracing a large number of objects, only one of which can be covered by its title." The same difficulties exist in the present case, and the same consequences would follow the arbitrary construction which we are asked to make. In referring to the prior state of the law for light as to the intent of the constitutional provision we are not left to vague conjectures as to the objects intended to be accomplished and the mischief designed to be remedied. They are clearly ascertainable by an inspection of the acts themselves. One of the evils designed to be remedied was the vicious system then prevailing of *extending*, at different sessions of the legislature, the

operation of a special statute, enacted for a certain county or town, to other counties or towns by reference to its title merely, and in many cases publishing no law whatever. Thus, on February 9, 1874, the territorial legislature declared "that the provisions of an act entitled 'An act concerning *certiorari* to justices and probate courts,' approved February 2, 1872, being a special act applied to Gilpin county alone, be extended and made applicable to Boulder county." Laws 1874, p. 65. This is the entire act as published, save the title. Another act illustrating this sort of legislation reads as follows: "That the act entitled 'An act to regulate ditches used for farming purposes in the counties of Costilla and Conejos,' approved February 5, 1866, be and the same is hereby extended to and made applicable in the county of Huerfano." Laws 1872, p. 143. By the foregoing and similar legislation no laws on the subject-matter of the titles employed were either enacted or published. It was merely extending, by reference to titles, laws enacted for certain localities to other localities. In such cases these acts, *as published*, were incomplete and unintelligible.

✓ We will now give an example illustrating all the evils designed to be cured, an example of the manner in which statutes were sometimes *revived*, *amended* and *extended*, by reference to the title only, without publishing the acts in the form so left, showing the changes therein made. We refer to the act of March 11, 1864 (Laws 1864, p. 139), which prescribes rules and regulations for executing the trust arising under the act of congress of May 23, A. D. 1844, and any amendments that were made thereto, "for the relief of citizens of towns upon lands of the United States, under certain circumstances." This was an act consisting of twenty-two sections, and was applicable to the whole territory. On February 10, 1865, another act was passed purporting to be amendatory of the former act. The first section is as follows: "That section 2 of said act be amended by inserting the words, 'his or their

successors,' between the words 'congress' and 'shall,' in the third line from the top of said section." The remaining sections provide for the sale of unclaimed lots and blocks of land in the town of Boulder under the provisions of the original act as amended. The seventh section of the amendment is as follows: "That this act shall be construed to apply alone to the town of Boulder, in the county of Boulder, territory of Colorado." Laws 1865, p. 130. Another act, purporting to amend the original act, was passed February 9, 1866, the amendments all relating to lots in the city of Denver. Laws 1866, p. 87. By this time the legislature appear to have entertained doubts as to the existence of the original act. Accordingly, on February 11, 1870, an act was passed "to *revive and amend*" the original act, "so as to provide for the disposition of lands and lots in the town of Georgetown, under the act of congress entitled 'An act for the relief of the inhabitants of cities and towns upon the public lands.'" The first section declares that the "act approved March 11, 1864, be, and the same is hereby, revived, and declared to be in full force and effect: provided that said act shall be taken and held, in its different provisions, to intend an act of congress entitled 'An act for the relief of the inhabitants of cities and towns upon the public lands,' approved March 2, 1867;" which, it will be observed, was a different act of congress from that mentioned in the original act. Sections 8, 15, 18 and 21 are then declared to be stricken from the original act. Certain words are then stricken out, and certain others inserted in lines 1 and 2 of section 9, in lines 4 and 5 of section 14, in lines 7 to 18, and 23 to 28 of section 12, and certain words stricken out of the last line of section 11, and the twenty-ninth line of section 12. Finally, it is declared "that the act hereby revived shall have no other or further effect than to provide for the disposition of lands and lots in the town of Georgetown * * * under said act of congress, approved March 2, 1867." The foregoing ex-

amples will be sufficient to illustrate the evil system of legislation existing at the date of the constitution. Acts of the legislature were often incomplete in themselves, and in order to ascertain what the law was on a given subject, it was necessary to collect the amendments made thereto at successive legislative sessions, and out of the scattered fragments to construct an act which should express the final will of the legislature. It was this state of bewilderment and confusion into which the laws had been thrown by *special legislation*, by amendments made by reference to *lines and sections*, and by the *wholesale extension* of laws, that was designed to be corrected and guarded against by section 24 of the constitution.

The constitution of New York contains a provision which is the same in substance and effect. It is: "No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act." Sec. 17, art. 3. In construing this section the court of appeals said: "It is not necessary, in order to avoid conflict of this article of the constitution, to re-enact general laws whenever it is necessary to resort to them to carry into effect a special statute. Such cases are not within the letter or spirit of the constitution or the mischief intended to be remedied. By such a reference a general statute is not incorporated into or made a part of the special statute. The right is given, the duty declared, or burden imposed by the special statute, but the enforcement of the right or duty, and the final imposition of the burden are directed to be in the form and by the procedure of the other and general laws of the state. Reference is made to such laws, not to affect and qualify the substance of the legislation, and vary the terms of the act, but merely for the formal execution of the law." *People v. Banks*, 67 N. Y. 568.

We think it clear that the act organizing and prescribing

ing the jurisdiction and procedure of the superior courts is not obnoxious to the constitutional objections made. We are also of opinion, for the same reasons, that the term of the court below did not lapse, as claimed, and that the court had jurisdiction to render the judgment appealed from.

The remaining errors assigned question the authority of the court to render judgment against appellant upon the law and the evidence. The main ground of defense is the license granted the appellant by the city ordinance of January 28, 1881, which, it is contended, afforded it, under the charter of February 13, 1874, the same rights and immunities in the streets as the proprietors of other modes of conveyance. In so far as the legal points raised and discussed involve a construction of the state constitution they are settled in the case of *City of Denver v. Bayer*, 7 Colo. 113. And so far as the attempt is here made to obtain a reconsideration of the construction there given to the constitution it must fail. That question was thoroughly investigated by the court, and the decision made after a careful consideration of all the authorities bearing thereon. We are satisfied with the construction adopted and adhere thereto.

The argument here is largely based on the proposition that the constitution does not control the questions arising in this case, for the reasons that it went into effect subsequent to the passage of the law under which the street in question was dedicated to public uses, subsequent to the act of dedication, and subsequent to the date of the city charter by virtue of which the ordinance was passed licensing the appellant's occupation of the street in question. The first questions which we will proceed to consider are what was the nature and extent of the title acquired by the city of Denver in and to the streets of additions thereto, which, prior to the constitution, were surveyed, laid out, platted and made part of the city under the provisions of the general statutes then in force,

and in conformity with its charter, and what rights and interests in said streets, if any, remained with the proprietors of the land or their grantees, the abutting lot owners? The constitution went into effect August 1, 1876. Daniel Witter's first addition to the city of Denver, in which the appellee's lots are situate, was legally surveyed, laid out, and the plat thereof recorded in the manner provided by statute, and became, by force of the statutes, part of the city, May 9, 1876. R. S. 1868, p. 616, § 12; R. S. 1868, pp. 618, 619, §§ 1-5; Charter 1861-1874, art. 1, § 3. It will be observed that the statute in such cases does not vest in the city an absolute fee in the streets. Section 5, page 619, Revised Statutes, is as follows: "Upon the filing of any such map or plat the fee of all streets, alleys, avenues, highways, parks, and other parcels of ground reserved therein for the use of the public, shall vest in such city or town, if incorporated, in trust for the uses therein named and expressed; or if such town be not incorporated, then in the county until such town shall become incorporated, for the like uses." The effect of this provision is to vest in the city a qualified fee in the streets for the use of the public. The alleged power of the city to authorize the occupation of the public street called "Willow Lane" by an ordinary railroad, with trains of cars propelled by steam-engines, without liability for injuries to property occasioned by the construction and operation of the railroad, seems to be based on the proposition that the city, by virtue of the dedication mentioned, was vested with title to the streets in fee absolute under the statutes then in force. This proposition is defeated by the express words of the statute just cited. The effect of the dedication proceedings was merely to vest in the city the title to the streets in trust for the general public for street purposes. As to all other purposes there remained in the proprietor of the addition reserved rights in the streets, which were capable of being transferred by deed to the purchasers of abutting

lots, as rights appurtenant thereto. These are property rights, and are held by the courts to constitute property. All public dedications, said the supreme court of the United States, must be considered with reference to the use for which they are made. *Cincinnati v. White's Lessee*, 6 Pet. 431.

A dedication for street purposes constitutes a contract between the proprietor of the land on the one hand, and the representative of the public on the other. Cooley, Const. Lim. (5th ed.) 331-335. In the present instance an absolute fee in the streets not having passed to the city, it becomes important to construe the contract of dedication in order to ascertain the respective rights and privileges of the parties thereto. The weight of authority is to the effect that when the fee of a street is in the municipality in trust for the public for street purposes, the paramount control thereof is in the legislature as the representative of the public, and the municipality may apply them to such uses as are authorized by statute. In the absence of legislation on the subject, the municipal government may appropriate the streets to the ordinary purposes of business and travel. The usual modes of travel and the usual means of conveyance may be employed by which the inhabitants are accustomed to pass or be conveyed through the streets of a city. Appropriation of the streets to such uses is authorized by the common law. The abutting lot owner is presumed to purchase with knowledge of this servitude, and for injuries to his property necessarily incidental to those uses he cannot complain. When the legislature vests in the municipal authorities a general control of the streets, judicial opinion is divided concerning the extent of such power. The better view would seem to limit the authority to the ordinary uses of the streets. This includes such modes and means of passage upon and over the streets as are usual in cities, and such additional uses as the health and convenience of the city, in view of the ex-

tent of its population, may require; as the construction of sewers, the laying down of gas and water pipes, the grading and paving of the streets, and the like. But this general supervisory power is not to be enlarged by construction, so as to authorize an extraordinary use of the streets, or their use by extraordinary or unusual means, without express or clearly implied legislative sanction. If the municipality, without statutory authority therefor, authorizes their use for or by extraordinary purposes or means, in such a case as the present it would be inconsistent with the contract of dedication, for the lot owner does not purchase with notice that the streets may be put to such uses. Cooley, Const. Lim. 676; 2 Dill. Mun. Corp. §§ 680-683; also §§ 713-717; Mills, Em. Dom. §§ 202-207; Pierce, R. R. 242-246. The decisions of the court of appeals of New York are recognized by law-writers and courts as weighty authority on these questions. The decision in *Story v. Railroad Co.* 90 N. Y. 122, and the re-affirmance of its doctrines (in February of the present year) by the case of *Lohr v. Railroad Co.* 10 N. E. Rep. 528, sustain the views above advanced.

The following general deductions may be made as to the *status* of cases similar to the one before us, considered, as counsel suggests it ought to be, under the territorial organization and statutes alone: *First.* That the city council might properly authorize the streets of an addition to the city to be used for all ordinary and necessary purposes to which city streets are usually subjected, and to such further *local* uses and means of conveyance as the legislature may have authorized for the streets and thoroughfares of the entire city. *Second.* That the proprietor of the addition and his grantees must be held to have anticipated all these uses; and that incidental injuries arising from a careful exercise of those rights are *damnum absque injuria*. But as to extraordinary uses, those not authorized by legislative sanction for general application throughout the city, including its additions,

no such immunity exists. A license from the city, in the latter class of cases, would be no defense to an action for damages to abutting property.

But it is asserted, and the assertion frequently repeated throughout the extended brief of counsel for appellant, that the legislature conferred on the city, by its charter of April 7, 1874, in force at the time of the dedication, full power to appropriate these streets to all modes of travel, including railroad cars propelled by ordinary steam-engines. Upon this assertion is based the proposition that abutting lot owners must be held to have purchased their lots with notice that the streets might be appropriated to such uses.

We do not think these views are sustained by the provisions of the city charter. That instrument empowered the city council, "by ordinances not repugnant to the constitution of the United States or the organic law of this territory, to open, alter, abolish, widen, extend, establish, grade, pave, or otherwise improve and keep in repair, streets, avenues, lanes, alleys, sidewalks, drains and sewers." Art. 6, sec. 3, cl. 6. It authorized the city "to regulate and run horse-railway cars, or cars propelled by dummy engines, laying down tracks for the same, transporting passengers thereon, and the form of rail to be used: provided, that no ordinance shall be passed conflicting with any rights vested in the Denver City Railway by their charter." Sec. 3, cl. 45. Clause 47 of the same section is as follows: "To regulate and prohibit the use of locomotive engines, require railroad cars to be propelled by other power than that of steam, to direct and control the location of railroad tracks, to require railroad companies to construct, at their own expense, such bridges, tunnels or other conveniences at public railroad crossings as the city council may deem necessary, and to regulate the speed of all railroad trains."

These are all the provisions of the charter bearing upon

the subject, aside from the provisions concerning condemnation proceedings. It is clear that the power alleged is not contained in either the sixth or the forty-fifth clause of said section 3. The forty-seventh clause does not mention streets, although it may include them, nor does it purport to regulate the use of any mode of conveyance mentioned in the other clauses or ordinarily employed for the purposes of local travel through the city. This latter clause relates to railroad companies, and to the ordinary railroad tracks on which trains of freight and passenger cars, propelled by ordinary steam-engines, are hauled back and forth between distant *termini*. This clause was not intended to authorize cars or trains of cars drawn by steam-engines to occupy and use the streets and thoroughfares generally, in common with all other modes of conveyance. The general scope of the clause, as indicated by the language employed, is the regulation of ordinary railroads, whose lines shall be extended into and through the city. And while it was within the contemplation of the legislature that they might enter and pass through the city, the power to regulate, direct and control them in the particulars specified was not confined to such as should be constructed longitudinally through the streets, but included as well those built wholly or in part through other ground, and only crossing the streets, diagonally or otherwise. There is no evidence of any intention in this clause of the charter to authorize the city council to license railroad corporations to lay their tracks, and operate their roads into and through the city, so as to afford them immunity from liability for the actual injuries thereby resulting to the property of citizens. There being, then, in the charter, no authority to use the streets generally for these purposes, nor any intention to grant immunity against injuries for the invasion of private property, the provisions of the charter constitute no defense to this action. If the grant of power to license the corporations last men-

tioned be inferable from the forty-seventh clause it would necessarily be applicable to a few only of the numerous streets of the city. Being, therefore, a special power, it could not be held to have been within the contemplation of the act of dedication. The law is well settled that for the diversion of streets from the purposes regularly contemplated when they were dedicated, compensation must be made for injuries inflicted upon the property of abutting lot owners. The license to the defendant set up in the answer, therefore, constituted no bar to the action for damages.

Another point made and strongly urged is that the state constitution affords no remedy to the abutting lot owners in this case. The reasons assigned are — *First*, that the entire title to the street in question had passed to and vested in the city prior to the time the constitution went into effect; *second*, that the constitution does not, even by implication, divest the municipality of any powers over its streets previously conferred by its charter. It is not material to the right of action in the present case whether the constitutional provisions be applicable or not, since the right of action exists without reference thereto; yet, since the injury was done to appellee's property after the constitution went in effect, its provisions may be properly invoked. It may be conceded that the adoption of this instrument neither modified or curtailed the powers previously conferred on the city council over the streets; also that the legal rights and interests of the lot owners in the street remain as established by the act of dedication. The constitutional provision, "*that private property shall not be taken or damaged for public or private use without just compensation*," while not intended to disturb vested rights, nor in itself prohibitory of the exercise of powers previously granted by the legislature, is remedial in its nature and effect respecting existing property rights. Its mandate is that, where they are taken or injuriously affected subsequent to the day on which

the constitution went into effect, just compensation shall be made. That the appellee had a legal interest and vested rights in the street we have already decided. That his property was injuriously affected by the construction and operation of appellant's railroad in the street on which his lots abutted, after the constitution went into effect, sufficiently appears in the record before us. The phrase of our constitution, "or damaged for public or private use without just compensation," is an extension of the common constitutional provision designed for the protection of private property. It is a recognition of a new right of recovery, which is not limited to cases where an action would have lain at common law.

A point is made that no replication being filed to the third defense set up in the answer of the appellant, the same was admitted by appellee, and that on this ground the judgment should be for the appellant. This defense sets up the facts of dedication of Witter's first addition to the city, on May 9, 1876, and the license from the city to the appellant. In so far as the facts stated in this defense are concerned the failure to reply admits the same. It does not, however, admit the conclusions of law and the argumentative propositions therein contained. No exceptions were saved to the evidence, and it cannot be considered for any other purpose than to determine whether the court was authorized thereby, under the law, to find the issues for the plaintiff, and to render judgment in his favor. The evidence was ample for these purposes.

There being no reviewable error in the record, the judgment will be affirmed.

ELBERT, J., concurs in the conclusion.

HELM, J. I do not think the ownership of the fee of the street by a municipal corporation operates, in cases like this, to cut off the abutting lot owner's right to compensation under the constitution. But, be this as it may,

the chief justice has demonstrated in the principal opinion that the fee to Willow Lane is, by the very terms of the dedication and statute, conveyed to the city of Denver in trust. If, therefore, under existing laws, there can be such a thing as a wholly unqualified fee in the city to a street, there is no room for contention that this title is such a fee. And the argument based upon the absolute ownership by the city of the fee to Willow Lane requires no further notice.

We may concede that the statute under which Witter's addition was recorded permits the granting of a right of way by the city council for the construction of an ordinary railroad through the street in question; and we may concede, but without intending to pass upon its correctness, counsel's conclusion that the power thus given originally carried with it, when exercised, immunity from damages for injury to the abutting owner; still it would not follow that such immunity exists in the case at bar. The ordinance granting defendant a right of way through Willow Lane street was adopted after the constitution took effect, and the injury of which plaintiff complains was inflicted with that instrument in force. If the statute theretofore existing avoided liability for injuries like those here complained of, it was to that extent inconsistent with the constitution, and to that extent repealed by the constitution. Sec. 15, art. 2, Const.; sec. 1, Schedule to Const.

Concerning the exact force of the expression, "or damaged," as used in section 15, article 2, of the constitution, I desire to add a few words. This expression, or its equivalent, has received two different interpretations from the courts: *First*, that it merely recognizes a right of action *where one would have existed at common law* but for condemnation statutes, or statutes enacted with a similar design. This is the view taken by the English courts, not without strong dissenting opinions, of a similar statutory phrase, and of the same constitutional pro-

vision by at least one American case. See *City v. Bayer*, 7 Colo. 113. *Second*, that these words are the recognition of a *new right of action* not necessarily known to the common law. This seems to be the construction given, though without discussion, by the supreme courts of several states in the Union. But as declared by us in *City v. Bayer, supra*, it makes no difference which of these views be adopted in cases like this; for a careful examination of the decisions adhering to the former shows that they would justify the recognition of a right of action at common law under the facts of this case were there no statute and ordinance permitting the use of the street by the defendant corporation. While, if the latter view, to which I am strongly inclined, be accepted, plaintiff's right to compensation is clear.

The principal reason for the position that the phrase in question, and phrases of similar import, only give a right of action where one would, in the absence of such statutes as those above mentioned, have existed at common law, is the consequences to which the opposite view might lead. It will be observed that the constitution inhibits the damaging, without compensation, of private property for either public or private use. By giving these phrases a literal and wholly unqualified construction, we not only forbid the necessary and careful improvement of a street by the city, without compensation for incidental injuries to the abutting owner, but we also forbid the lot owner himself improving his premises in a legal and careful manner, without compensating an adjoining lot owner for incidental injuries occasioned by such "prudent exercise of his right of dominion." This would be to announce the rule that one must so use his own as to inflict absolutely no injury or inconvenience upon another, and that, if he do not, he must expect to respond in damages to that other; it would be practically to say that, in this state, there can be no injuries to realty covered by the doctrine of *damnum absque injuria*.

This court has uniformly declined to find in the constitutional language under consideration any such unqualified meaning. We know, and it is a proposition that will not permit of serious discussion, that such was not the intention of the people in adopting this language, or of the convention in using it. We think, and have so said, that it was the intention to permit a recovery for injuries inflicted upon an abutting owner through the occupation and use of a street by an ordinary railroad. And with equal confidence we have announced the view that it was *not* the intention to allow compensation to an abutting owner for injuries occasioned through a reasonable and careful improvement of the street by the city, for the benefit of the local public. *City v. Vernia*, 8 Colo. 399; *City v. Bayer*, *supra*. The framers of the constitution, and the people who voted for its adoption, understood that, with this instrument in force, certain injuries suffered by the proprietor of land through the legitimate and careful improvement of adjoining ground would continue to be wrongs for which the law provides no remedy. So, also, did the convention and the people understand that the abutting lot owner would anticipate, in making his purchase, that the street would necessarily be occupied by the local public for all the *usual and ordinary* uses of a highway; that the city would, from time to time, under the statutory powers conferred, so change and improve the street as to render it more convenient and useful for such purposes; and that incidental injuries indirectly resulting to him from such improvements would still be, as they were before the constitution, wrongs without a legal remedy. But it cannot be reasonably asserted that, in framing and adopting this constitutional provision, it was understood that the abutting owner would anticipate such an *unusual and extraordinary* use of the street as the one under consideration in this case; or that he would make allowance for such use in his purchase of the lot, or dedication of the street, as

the case might be. A distinction was, in my judgment, intended between those uses to which *every* street is primarily and necessarily dedicated, and those extraordinary uses which are tolerated in but very few, probably not more than one in a hundred, of the many streets required for its convenience by the local public.

I indorse the views of the chief justice concerning the jurisdiction of the superior court in the premises, and regularity of the proceedings before it. Upon the foregoing grounds, I also approve of the conclusion reached by him on the other branch of the case.

Affirmed.

DENVER CIRCLE R. Co. v. WIGGINS AND WIFE.

Appeal from Superior Court of Denver.

Messrs. J. P. BROCKWAY, E. O. WOLCOTT, E. L. JOHNSON and C. E. GAST, for appellant.

Messrs. T. A. GREENE and H. B. JOHNSON, for appellees.

PER CURIAM. We discover no reversible error in the trial of this cause. The questions of law involved were passed on in *Railroad Co. v. Nestor* (decided at the last sitting). It was there held that the ordinance of the city permitting the appellant to lay down its track in the street, and to operate its cars and engines therein, constituted no defense to an action for real injuries done to abutting property. We are likewise of opinion that the evidence in this cause warranted the judgment, and it is therefore affirmed.

Affirmed.

DENVER CIRCLE R. CO. V. CLARK.

Appeal from Superior Court of Denver.

Messrs. J. P. BROCKWAY, E. L. JOHNSON and C. E. GAST, for appellant.

Messrs. BROWNE and PUTNAM, for appellee.

BECK, C. J. The appellant in this case alleges that appellee was the owner of three lots with dwelling-house and improvements thereon, situated in Summers' first addition to the city of Denver; that these lots abutted on Clark and Carson streets, and that appellee constructed and operated its railway on Clark street in front of said lots and property. The injuries for which damages are claimed are the same as in *Railroad Co. v. Nestor* (just decided). And in addition, damages are asked for the destruction by fire, ignited by sparks from one of appellant's engines, of a store-room on the premises.

Owing to an oversight in making up the transcript, perhaps, it does not appear that any answer was filed in this cause; but since the respective counsel have treated the case in their briefs and stipulations as if the same defenses had been interposed as in the case just decided, and since the same errors are assigned, we too feel warranted in so treating it. There was no appearance for the appellant at the trial. The testimony on the part of the appellee warranting a judgment in his favor, it is therefore ordered that judgment be affirmed.

Affirmed.

DENVER CIRCLE R. CO. v. BIGLER.

Appeal from Superior Court of Denver.

Messrs. J. P. BROCKWAY, E. L. JOHNSON and C. E. GAST, for appellant.

Messrs. BROWNE and PUTNAM, for appellee.

BECK, C. J. The same questions are presented in this case as in the case of *Railroad Co. v. Nestor* (decided at the present sitting). They arise also on substantially the same state of facts, save that the property injured is situated in Elmwood's addition to the city of Denver, which was dedicated to the city after the state constitution went into effect. We are of opinion that the law and evidence warrants an affirmance of the judgment, and it is accordingly done.

Affirmed.

DENVER CIRCLE R. CO. v. MARTIN.

Appeal from Superior Court of Denver.

Messrs. J. P. BROCKWAY, E. L. JOHNSON and C. E. GAST, for appellant.

Messrs. BROWNE and PUTNAM, for appellee.

BECK, C. J. This case presents the same questions, based upon a similar state of facts, as *Railroad Co. v. Nestor* (decided at the present sitting). That case is decisive of this, and the judgment is accordingly affirmed.

Affirmed.

LITTLE BOBTAIL GOLD MINING Co. v. LIGHTBOURNE AND
OTHERS.

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Section 30 of the Colorado act of March 14, 1877, providing for the formation of corporations, which provided for service of summons in suits against them, was repealed by implication by the act of March 17, 1877, providing "a system of procedure in civil cases in courts of justice," section 87 establishing a new method of service.

Error to County Court, Gilpin County.

JAMES E. LIGHTBOURNE and L. S. Newell, partners as the Gilpin Coal, Feed & Lumber Company, plaintiffs, sued the Little Bobtail Gold Mining Company, defendant. Judgment for plaintiff. Defendant appealed.

Messrs. TILFORD and GILMORE, for plaintiff in error.

STALLCUP, C. The plaintiff in error was a corporation and was defendant below. A question as to the validity of the service of the summons upon it is presented for consideration here. The service of summons, as shown by the return thereon, was made on J. H. Bowan, general manager and agent of the defendant. The question presented is disclosed by the following assignment of error: "It did not appear from the return of the sheriff on the summons that the service of the summons was made in the county where the principal office of the corporation is kept, or its principal business carried on, by delivering a copy to the president thereof, or, in the case of his absence from such county, that the service was made on either the vice-president, secretary, treasurer, cashier, general manager, general superintendent or stockholder of such corporation, and no excuse is shown why service was not so made as aforesaid."

An act of our legislature, entitled "An act to provide for the formation of corporations," was approved March 14, 1877; section 30 of which act provided as follows: "In suits against any corporation, summons shall be

served in that county where the principal office of the corporation is kept, or its principal business carried on, by delivering a copy to the president thereof, if he may be found in said county; but if he is absent therefrom, then the summons shall be served in like manner in such county on either the vice-president, secretary, treasurer, cashier, general agent, general superintendent or stockholder of said corporation within such time and under such rules as are provided by law for the service of such process in suits against real persons; and if no such person can be found in the county where the principal office of the corporation is kept, or in the county where its principal business is carried on, to serve such process upon, a summons may issue from either one of such counties, directed to the sheriff of any county in this state where any such person may be found, and served with process." An act of the same legislature, entitled "An act to provide a system of procedure in civil actions in courts of justice in the state of Colorado," was approved March 17, 1877; section 37 of which act provides as follows: "If the suit be brought against a corporation, service shall be made by delivering a copy of the summons to the president or other head of the corporation, or to the secretary, cashier, treasurer or general agent thereof; but, if no such officer of the corporation can be found in the county, service may be had on any stockholder of such corporation. If the suit be against a foreign corporation, or a non-resident joint-stock company or association, doing business within the state, service shall be made by delivering a copy of the writ to an agent, cashier or secretary thereof; in the absence of such agent, cashier, treasurer or secretary, to any stockholder."

It is apparent that plaintiff in error relies upon the provisions of the former act. But the service was made under the provisions of the latter act, and was in accord therewith. The provisions of the former act in this re-

gard were repealed by the provisions of the latter act. This presents an instance of undoubted repeal by implication, as the title to, and the language employed in, the latter act, upon this subject, are as comprehensive, direct and effective in entirely extinguishing the provisions of the former act upon the same subject as any direct expression to that effect would be. The judgment should be affirmed.

We concur: MACON, C.; RISING, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment of the county court is affirmed.

Affirmed.

ATCHISON, T. & S. F. R. Co. v. BETTS.

1. Under the statute creating a liability against a railroad company for killing stock, such liability is independent of any question or element of negligence; nor can such imposition of the liability be regarded as a penalty.
2. Courts do not take judicial notice of the statutes of other states; they must be shown like other facts.

Appeal from Las Animas County Court.

THIS was an action brought by appellee, F. G. Betts, against the appellant, the Atchison, Topeka & Santa Fe Railroad Company, before a justice of the peace of Las Animas county, for the value of a mule which had been killed upon the railroad of appellant. From the judgment of the justice an appeal was taken to the county court, and trial was there had *de novo* and to a jury.

All the evidence given at the trial was the testimony of appellee, which was as follows: "I am plaintiff in this cause. In the month of December, A. D. 1882, I owned a mule which was killed by defendant. I lived at said

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18	263
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18a	104

time in the city of Albuquerque, territory of New Mexico. I was using at said time the mule which was killed, with other teams. There was no hay in town. I turned the mule which was killed loose with the other animals which I was using in the town of Albuquerque, and about one-half mile from the depot of defendant, in said town. It was in the evening when the mule was turned loose, and I found it the next day about 11 o'clock, lying upon the track of defendant, dead. It was lying in the depot yards near the depot of defendant, with its head lying across the rail of one track. I examined the mule, and found that one side of its head was mashed, and its skull broken. I skinned that part of the head which was injured, and found the skull was mashed and broken. The mule was worth \$200. The tracks made by the mule indicated that it was struck eighteen or twenty feet away from where it lay, on another track, by the cars of defendant. Had notice describing the mule, cause of its death, and value made out, sworn by me, and served on the station and depot agent. Had an appraisement made by two persons, who valued the mule at \$200. The notice and appraisement were sent to Topeka to the claim agent of defendant, and I was not able to get the papers returned to me."

The witness was here asked the following questions by plaintiff's attorney: "How did defendant operate the road at that place with regard to running its trains and switch-engines?" Question objected to by defendant as immaterial, and not showing any connection with the injury to the animal. Objection overruled, and exception by defendant. "*Answer.* The defendant was in the habit of running its switch-engines rapidly in and about the depot yards." The witness was asked the following question: "What was the custom of the people in and around Albuquerque as to allowing their stock to run at large?" Objected to by defendant as immaterial to the issues of the case. Objections overruled, and the defendant, by

its counsel, then and there excepted. "A. It was the custom of Mexicans and Americans to allow their stock to run at large there, and a large number of stock was running loose in the vicinity. Q. State whether the fact that large numbers of stock were running at large was known to the agents and employees of defendant at said time?" Objected to by defendant as immaterial to the issues. Objection overruled, and defendant, by its counsel, then and there excepted. "A. The agents and employees of defendant knew that such was true. Q. State whether the defendant by any of its agents admitted the killing of the mule." Objected to by defendant for the reason that such admissions would not bind defendant, and that no agency was shown. Objection overruled, and defendant, by its counsel, then and there excepted. "A. The agent at that point said if defendant killed the mule it would pay for it." The witness further testified that defendant did not have its yards or tracks in Albuquerque fenced; that defendant used, for a switch-engine, an ordinary engine, and not a double-header. There was a good deal of business done at that point by defendant, and defendant run its switch-engines very rapidly, night and day, both forward and backward. Albuquerque is situated in a stock country, where stock-raising is the principal business.

On cross-examination witness testified that he lived in the city of Albuquerque, New Mexico, at the time the mule was killed, and about one-half mile from the depot and yards of defendant, and that he turned the mule loose at his place of residence in the evening, and found it dead upon the track of defendant, and in the yards of defendant in said town of Albuquerque. Did not know how the mule was killed but from the circumstances as stated on direct examination. This was all the evidence offered by either of said parties to said cause.

The second instruction asked by the plaintiff below, and given by the court to the jury, was as follows: "If the

defendant railroad company, by gross negligence, killed plaintiff's mule then the defendant is liable for the damages, and is so liable under common-law principles, without regard to the statutes of New Mexico."

The third and sixth instructions asked by defendant, and refused by the court, were as follows: "(3) If the jury believe, from the evidence, that the plaintiff turned his mule loose in the city of Albuquerque, New Mexico, and allowed it to stray upon the track of the defendant, where it was killed by defendant, then the plaintiff was guilty of negligence, and cannot recover the value of the mule." "(6) If the jury believe, from the evidence, that the plaintiff allowed the mule, for the value of which this suit is brought, to stray upon the track of defendant, and was there killed by the cars or engines of defendant, then the plaintiff was guilty of negligence, and cannot recover in this action."

The jury returned a verdict for the appellee, plaintiff below, in the sum of \$200, and the appellant, defendant below, moved for a vacation thereof, and for a new trial, for the following reasons: (1) That the verdict in said cause is contrary to the evidence; (2) that said verdict is contrary to the law in said cause; (3) that the court erred in admitting the testimony of plaintiff concerning the manner of running the engines in yards of defendant, over objections of defendant; (4) that the court erred in admitting the testimony of plaintiff with regard to the general custom of allowing stock to run at large in Albuquerque, and that defendant, by its agents, had knowledge of this fact; (5) the court erred in refusing the third and sixth instructions asked by defendant; (6) the court erred in giving the second instruction asked by plaintiff.

The court overruled the motion for a new trial, and gave judgment for appellee, plaintiff below, upon the verdict. The appellant duly excepted, and brings the case here by appeal, and assigns errors as follows: "*First.* The court erred in admitting improper testimony for and on

behalf of the plaintiff in this: that it erred in permitting the plaintiff to testify as to the manner of operating defendant's road with regard to running its trains and switch-engines in the depot yard at Albuquerque; also in permitting the plaintiff to testify as to the custom of the people in and around Albuquerque in allowing their stock to run at large, and that this custom was known to the agents of the company; all of which testimony, as shown in folios 17 to 20, was admitted over the objection of the defendant. *Second.* The court erred in instructing the jury, at the instance of the plaintiff, that the defendant company was liable in the premises if the animal in controversy was killed by gross negligence; there being no evidence whatever in the cause to establish gross negligence, or any negligence whatever, on the part of defendant company. *Third.* The court erred in refusing to give to the jury the third and sixth instructions, and each of them, asked by the defendant. *Fourth.* The court erred in overruling the motion for a new trial. *Fifth.* The verdict is against the law and the evidence, wherefore said appellant prays that the said judgment may be reversed and set aside."

Mr. C. E. GAST, for appellant.

Mr. J. O. PACKER, for appellee.

STALLCUP, C. Were the facts shown sufficient to warrant the judgment for the value of the mule? In this state we have a statute fixing an unqualified liability against a railroad company for stock killed by it in the operation of its railroad business, which is as follows: "That every railroad or railway corporation or company, operating any line of railroad or railway, or any branch thereof, within the limits of this state, which shall damage or kill any horse, mare, gelding, filly, jack, jenny or mule, or any cow, heifer, bull, ox, steer or calf, or any

other domestic animal, by running any engine or engines, car or cars, over or against any such animal, shall be liable to the owner of such animal for the damages sustained by such owner by reason thereof." It is urged upon the part of the appellee here that our courts will presume that the laws of New Mexico on this subject are the same as our own. To go that far upon presumption would be against reason and the current of authority. Neither can it be said that this statute makes the liability rest upon the negligence of the railroad company, nor upon the assumption that all killing of stock by railroad companies in the operation of their engines and cars upon their tracks is negligence, and that such negligence is shown by proof of the killing; for there is no such expression in the statute, and such assumption or conclusion therefrom would be against reason, principle and the adjudications of the courts on the subject of negligence in such cases. The case of *Walsh v. Railroad Co.* 8 Nev. 111, was a case for the killing of a cow which had strayed on defendant's railroad track in the western part of the town of Gold Hill, in Storey county, Nevada. In the decision of the case the court say: "But it is not the law that the mere killing of a domestic animal by a railroad train is evidence of negligence. This question has frequently been before the courts, and invariably ruled against the plaintiff, except where the general rule of law is abrogated by positive statute. The fact of killing an animal of value by the company's engines, says Redfield, is not *prima facie* evidence of negligence. 1 Redf. R. R. 465. And it is so ruled in the following cases: *Scott v. Railroad Co.* 4 Jones (N. C.), 432; *Railroad Co. v. Means*, 14 Ind. 30; *Railroad Co. v. Reedy*, 17 Ill. 580; *Railroad Co. v. Patchin*, 16 Ill. 198."

It will be seen by the language used in our statute creating this liability that it is independent of any question or element of negligence; neither can such imposition of the liability be regarded as a penalty, for there is nothing

prohibited or commanded by the statute nor any wrong defined or declared thereby. The statute is novel and does not rest upon any general or commonly accepted principles of law. We see in such a statute that the declared policy of the state is to foster the stock-growing industry, and that the railroad companies, to this extent, shall bear the whole burden of loss occasioned by the conflict or accidental collisions which may occur in carrying on the business of the railroads and the business of stock-growing within the state. Such statute will be confined in its operation to the limits of our own state, and its adoption elsewhere will not be presumed in the absence of proof of the fact. Besides, if there is such a law in New Mexico, it would be a law of the legislature of New Mexico, and courts do not take judicial notice of the statutes of other states — they must be shown like other facts. *Polk v. Butterfield*, 9 Colo. 325; also sec. 387, Code Civil Proc., which provides how the proof may be made. So it follows that we cannot presume the existence of such law in New Mexico, and, in the absence of the proof of the laws of New Mexico, no matter what their provisions may be, they are unavailing to sustain the judgment. Neither can our statute referred to sustain the judgment, for the reason that the wrong or acts constituting the cause of action occurred beyond the limits of this state, so the statute can have no application to this cause of action.

In the consideration of a statute in the case of *Whitford v. Railroad Co.* 23 N. Y. 465, we have the following from the decision of the court in the opinion delivered by Denio, J.: "I have thus far assumed, without a formal statement of the principle, that the statute referred to has no force beyond the limits of the state of New York. This is an elementary doctrine and the contrary was not insisted upon as a general rule in the argument. The laws of New York have no greater operation in respect

to transactions which take place wholly within the territory of New Granada than the laws of that republic have in regard to New York transactions. It is no doubt within the competency of the legislature to declare that any wrong which may be inflicted upon a citizen of New York abroad may be redressed here according to the principles of our law, if the wrong-doer can be found here, so as to be subjected to the jurisdiction of our courts; but as we could not, by any legislation of this kind, put an end to the liability of the party to the *lex loci*, or divest the foreign government of its jurisdiction over the case, such a statute would rarely be just in its operation and would be more likely to lead to confusion and oppression than to any beneficial results. * * * This limitation upon the operation of the laws of a country is quite consistent with the practice which universally prevails, by which the courts of one country entertain suits in relation to causes of action which arise in another country, when the parties come here, so as to be made subject to their jurisdiction." To the same effect are *Bank v. Earle*, 13 Pet. 519; *Needham v. Railway Co.* 38 Vt. 307, 308.

It is claimed on the part of the appellee that the judgment is sustained by the principles of the common law, and the charge to the jury given at his request as to gross negligence; while it is urged in behalf of appellant that our courts should presume the existence of the common law in New Mexico, and that, by the principles thereof, the facts in this case show no right of recovery against appellant. It is evident that, under the principles of the common law, the facts shown would not warrant the recovery. Under the common law, an owner turning his domestic animals at large was thereby guilty of such negligence as would defeat his right to recover for injury to them, while so at large, except in cases of gross negligence. The evidence in this case shows no such negligence. In no view of the case does the

evidence show a liability. *Railway Co. v. Henderson*, ante, p. 1.

The judgment should be reversed and the case remanded for further proceedings.

MACON, C. I concur in the conclusion reached.

RISING, C. I concur.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment of the county court is reversed and the cause remanded.

Reversed.

LEACH ET AL. V. LOTHIAN.

10	439
21	193

When the record shows no foundation for the errors assigned they will be disregarded on appeal.

Appeal from Superior Court of Denver.

THIS was an action brought by Thomas Lothian against Samuel Leach and Charles Ross. The judgment below was in the plaintiff's favor and the defendants appeal.

Mr. W. J. HARVEY, for appellants.

Messrs. J. L. JEROME and O. H. TOLL, for appellee.

STALLCUP, C. The appellants were defendants below. The errors assigned are as follows: "(1) The court erred in not passing upon defendants' motion for a new trial; (2) the court erred in sustaining plaintiff's objection to the several offers of proof by defendants of failure of consideration of the note in suit; (3) the court erred in giving judgment for the plaintiff upon the whole record." The record shows no error in the proceedings and judgment of the court below. There were no exceptions taken there, and the evidence is not shown here. There is no

foundation for the said supposed errors assigned, as the matters upon which they are supposed to rest are not at all shown by the record here. The judgment should be affirmed.

We concur: RISING, C.; MACON, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment of the superior court is affirmed.

Affirmed.

10	440
15	7
10	440
18	69
10	440
22	246
78	883

STEWART V. STEVENS.

1. Grants of estate and easements of land are, by the statute of frauds, to be evidenced by properly executed and authenticated written instruments, and, except in cases of fraud on the part of the land owner, are not to be otherwise created.
2. The damage to support an estoppel against the owner of an estate and convert him into a trustee must be something more substantial than what would technically amount to a consideration in a contract. It must be of such a character that the person sustaining it cannot be put back into his former condition, and cannot be adequately compensated by pecuniary damages.
3. A contract was made between several parties, among them plaintiff and defendant, by which they agreed to form a company and dig a ditch across specified lands, to be dug and sustained by the parties to the contract in proportion to the lands benefited. The company was afterwards dissolved before the ditch was dug. *Held*, that this agreement did not give an individual member of the company, after the dissolution of the latter, a right to dig a ditch across another individual member's land.
4. If it is conceded that such agreement gave such right as to lands described, it could not give the right as to lands owned by a member, but not described.

Appeal from District Court, Douglass County.

Mr. J. W. HORNER, for appellant.

Mr. C. C. HOLBROOK, for appellee.

MACON, C. This suit was instituted by appellant, Izett Stewart, against appellee, Lewis G. Stevens, to restrain him from building a ditch upon and through certain lands of the former. A preliminary injunction was issued against appellee, but upon the final hearing it was dissolved and the suit dismissed. Complainant claimed title, dating back to 1871, to the south half of the southwest quarter of section 23, township 8, range 68, in Douglass county, Colorado, and title from 1875 to the southwest quarter of the northeast quarter, and the southeast quarter of the northwest quarter, the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter in the same section, township and range, the latter acquired from one John Jones; and that without right or consent of plaintiff, defendant threatened and was about to enter upon said premises and dig and excavate a large ditch; with other averments showing irreparable injury, and praying an injunction to restrain the alleged wrong. The preliminary injunction was allowed May 20, 1880. On August 10, 1880, defendant answered, admitting his purpose to enter upon the lands of plaintiff for the purpose of building the ditch thereupon, but alleged the grant of right of way from the plaintiff by deed dated April 12, 1872, which deed is in the words and figures following:

“Article of agreement, made and entered into this 12th day of April, A. D. 1872, between John Thomas, Albion Smith, Izett Stewart, John Lindsay and Lewis G. Stevens, all residing at West Plumb Creek, in the county of Douglass, and the territory of Colorado. Whereas, we, the said John Thomas, Albion Smith, Izett Stewart, John Lindsay and Lewis G. Stevens, do hereby mutually and severally agree to construct a ditch not less than two feet or more than four feet in width, to run through the several lands and farms as herein mentioned: John Thomas, south half of northwest quarter, section 26, town 8 south, range 68 west; Albion Smith, north half

of northwest quarter, said section 26; Izett Stewart, south half of southwest quarter, section 23, said town 8; John Lindsay, north half of southwest quarter, and south half of northwest quarter, and southwest quarter of northeast quarter, said section 23; Lewis Stevens, southwest quarter of southeast quarter, section 14, said town 8. We also jointly and severally agree to bear our proportion of outlay and labor necessary for the completion and repairs of the said ditch, the same to be proportioned and regulated according to quantity of water required, and do hereby agree upon, namely: John Thomas' supply of water to be sufficient to irrigate ten acres of pasture land or equal thereto; Albion Smith's, ten acres; Izett Stewart's, twenty acres; John Lindsay's, sixty acres; Lewis G. Stevens', two hundred acres,— whenever a sufficient supply of water can be obtained; but whenever a deficiency of water, each one herein named, his heirs, executors, or successors, shall be entitled to his or their adequate proportion. The said ditch to be commenced on Upton J. Smith's land, southwest quarter of section 26, town 8 south, of range 68 west, and to be continued to Lewis G. Stevens' land, southwest quarter of southeast quarter of section 14, said town 8; management to be regulated by shares; ten acres to be considered one share. In testimony whereof, the parties hereto this and one other instrument of the same tenor and date, interchangeably set their hands and seals, this 12th day of April, 1872.

[Signed]

“JOHN THOMAS. [SEAL.]

“ALBION SMITH. [SEAL.]

“IZETT STEWART. [SEAL.]

“JOHN LINDSAY. [SEAL.]

“LEWIS G. STEVENS.” [SEAL.]

And by virtue of an oral agreement and understanding between the parties to said deed, prior to the execution of the same; the allegation as to which is as follows: “That it was understood and agreed by and between such plaintiff and defendant and said other named per-

sons that each and all of said persons, including said plaintiff, were to grant unto each other a right of way for said ditch through their respective lands, and that said plaintiff was to grant to said defendant a right of way for said ditch through his, said plaintiff's, land. That thereupon, in furtherance of said agreement, and in consideration of the benefit to be derived by each of said parties from the use of said ditch, a certain writing was made, executed, acknowledged and delivered by and between the parties aforesaid." Plaintiff's title to the land described in his complaint is not denied, but it is averred in the answer that defendant does not intend to enter upon any of the land of plaintiff except that included in his grant of the right of way, as found in the deed and oral agreement. Plaintiff filed his replication, and denied the oral agreement charged, and that the land through which defendant proposed to run the ditch in part was the same land described in the deed. The final hearing of the case came on in December, 1883, when the court dissolved the injunction, and dismissed the plaintiff's bill; from which decree plaintiff appealed to this court, and assigns ten errors in the ruling of the court.

In our view of the case, it is not necessary or material to examine any of the assignments except the third and fourth. The third is that "the court erred in holding that the paper marked 'Exhibit E' entitled the defendant to build the ditch therein mentioned through land owned by the plaintiff and that acquired by the plaintiff after the execution of said paper marked 'Exhibit E,' and never owned by any of the parties to said agreement until acquired by the plaintiff." It is obvious that, if it be conceded that the written agreement of April 12, 1872, amounts to a grant of the right of way for the ditch over and into lands therein described, it cannot be so extended as to embrace other lands not described therein, and to which the parties thereto had then no title. And by the testimony of the appellee himself, it is seen that the sur-

veyed route of the ditch which he proposes to follow, if permitted to go on with the enterprise, passes over and through the northeast quarter of the southwest quarter, the southeast quarter of the northwest quarter, and the southwest quarter of the northeast quarter of section 23, being a distance, as described by him, of at least three-quarters of a mile, none of which land was the property of appellant in 1872, nor of any one of the parties to this agreement, but was, so far as the record discloses, the property of one John Jones, appellant's grantor. It is true, the written agreement describes the north half of the southwest quarter of said section, which includes the northeast quarter of the southwest quarter of said section, as the property of John Lindsay; but there is no evidence to support such claim, and as the burden of showing that such land was the property of said Lindsay on April 12, 1872, was upon the appellee, we must hold that, in the absence of such proof, the land was not Lindsay's when he signed said agreement. Hence the dissolution of the injunction, so far as it applied to these tracts of land last described, should not have been ordered, unless there was some other ground therefor *dehors* this agreement.

It is insisted by appellee that inasmuch as appellant remained silent from 1872 to 1880, while appellee continued the work on the ditch from 1873 to and including 1875, and bought and procured some lumber and timber for the ditch after 1875, he is estopped to dispute appellee's right of way through the land not described in the deed, as well as that described therein. The cases cited in support of this contention by appellee are not in point; the facts in this case failing to bring it within any of the rules enforced in those cases. In the first place, the deed which created the company, if it created any obligation upon the parties thereto, *was an obligation to the company* as a company, and not to the members thereof as individuals. The enterprise was to be a joint enterprise, and not an individual one. It is not necessary to

say what would have been the effect of the company's prosecuting the work and meeting with opposition on the part of appellant; because it is shown by both appellee and Hill, his witness, that every member of the company except appellee abandoned the enterprise after 1872, and declined to proceed further in it. From that time to 1880 appellee proceeded with the ditch alone, and, while he says he was working for all, he fails to show that he had any authority to do so. He could not have bound the company for anything done by him without its authority, express or implied. He shows no express authority, and the idea of an implied one is clearly negatived by the fact of abandonment of the work by all the other members as early as 1873. If, then, the company did not wish to go further in the work, and declined so to do, no promise by or conduct of appellant towards the company in 1872 would bind him after the abandonment of the work and the dissolution of the company. If he was not bound to the company after that time, it is clear he could not be to appellee, because the latter did not succeed to any rights of the company by assignment, succession or otherwise. In his prosecution of the work, then, appellee was acting solely on his own behalf, and in doing so the silence of appellant can give him no right whatever. A land owner may be aware that a railroad company has surveyed the route for a railroad over his land, and has expended large sums of money in grading up to his line, intending to enter his premises and build its road; but he may with impunity remain silent until the attempt is made to enter upon his land, and prevent such attempt by injunction. It would be an anomalous defense on the part of the railroad company that, by his silence, while he saw its survey across his land, and the great expenditures made in grading to his line, he should be estopped to assert his right to protect himself against invasion. The case of appellee on the facts is not stronger. The case of *Yonker v. Nicholls*, 1 Colo. 551,

is not in point, for the reason that since that case was decided we have formed a constitution which prohibits the taking of private property for private use without compensation; and the legislature has provided the proceedings by which, upon the payment of just compensation, private property may be subjected to private use. *Tripp v. Overocker*, 7 Colo. 72.

The record plainly discloses the further fact that appellee could not have been ignorant of the abandonment of the enterprise by appellant long prior to 1880. In his testimony he says: "That part of the ditch which had been built on the land claimed as Lindsay's, which was the northeast quarter of the southwest quarter of section 23, had been filled up by appellant before the year 1878;" which conduct was more clearly a dissent from and an objection to the further prosecution of the ditch enterprise than could have been made by oral declaration. Besides, appellant swears that he knew of no work done by appellee after 1872, and he is not contradicted on this point. Without knowledge on his part, silence would have no effect to estop him. *Bigelow*, *Estop.* 437.

Appellee relies further upon the alleged conversation between himself and appellant in March, 1880, in which the latter said he believed the water would not run through the ditch; that he would do no more work upon it until he was satisfied to the contrary, but that he would not oppose appellee's working on it, and to go ahead with it; relying upon which statement, appellee avers he proceeded with the work on the ditch, and performed one hundred and fifty-four days' labor thereon. This conversation is denied specifically by appellant; but, if it be admitted in its full meaning, it does not imply even a legal grant of right of way across appellant's land without compensation. Grants of estate and easements of land are by the statute of frauds to be evidenced by properly executed and authenticated written instruments,

and, except in cases of fraud on the part of the land owner, are not to be otherwise created. To allow loose and indefinite conversations, such as are relied on, to stand in lieu of the deed of conveyance, is a virtual repeal of the statute of frauds, which we are not inclined to favor. It is quite easy to find the meaning in the language, imputed to appellant, entirely consistent with his intention to exact compensation for the injury to his premises, which would result from the construction of the ditch.

Estoppels *in pais* are the creations of courts of equity, invented to prevent irreparable injury to a party who has been led into a course of conduct in reliance upon the representations of another, which it is inequitable to allow that other to retract; but these rules of equity are not resorted to if other rules of law can be invoked for the relief of the sufferer. Without intending to decide the question here, it is very doubtful if a right will ever be enforced against a party upon the ground of equitable estoppel, where the party claiming the benefit of it can enforce such right under a statutory power independent of estoppel. Here appellee could have condemned the land required for his ditch, and have secured the title thereto by payment of the compensation assessed by the appraisers. It is said in *East v. Dolihite*, 72 N. C. 567, that "the damage to support an estoppel against the owner of an estate, and convert him into a trustee, must be something more substantial than what would technically amount to a consideration in a contract. It must be a substantial one, and of such a character that the person sustaining it cannot be put back in his former condition, and cannot be adequately compensated by pecuniary damages."

Upon the facts of the case, it seems that this litigation is waged for no other purpose on the part of appellant than to compel appellee to pay for the right of way, and on the part of appellee to avoid such payment. If, however, it

were conceded that appellant intended to be understood as promising to dedicate the right of way to appellee from this conversation of March, 1880, according to the authority of *Brightman v. Hicks*, 108 Mass. 248, an estoppel would not arise upon it. In that case Gray, J., says: "A promise upon which the statute of frauds declares that no action shall be maintained cannot be made effectual by estoppel merely because it has been acted upon by the promisee and not performed by the promisor." We find no element of estoppel in the facts of the case.

The fourth assignment of error goes to the legal effect of the deed as a grant of right of way over the south half of the southwest quarter of section 23, township 8, range 68. This instrument is claimed by appellee to be a deed granting the right of way over and through the lands described therein, and upon that construction claimed the right he was attempting to exercise. This instrument contains no words of grant. It purports to be an agreement for a partnership for a single enterprise, in which the relative rights and duties of each partner are specified and protected, and nothing more. The fact that the lands through which the ditch was to be built are described therein as nothing more than a loose and indefinite designation of the route to be pursued, limited only by the boundaries of the several tracts of land mentioned. We find nothing in the so-called deed to warrant the conclusion that any party thereto designed to grant, free of cost, to the company the right of way over his land, and therefore cannot accept the view entertained and pressed by appellee. But if it showed a complete and perfect conveyance of the right of way over the lands described, as we have stated above, *the company* took the grant *in solido*, and not the individual members, and appellee has not shown himself entitled to these rights. The company dissolved in 1873, and positively refused to prosecute the enterprise further, and each of them made other ditches through which to flow water

upon their lands. Upon this dissolution, without transferring its property or franchises to any other person, its rights, whatever they might have been under this deed, were extinguished. It necessarily follows that the court erred in dissolving the injunction, and that the decree should be reversed, and the cause remanded with direction to re-instate the injunction; but appellee may proceed under the condemnation statutes.

We concur: STALLCUP, C.; RISING, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment of the district court is reversed and the cause remanded, with directions to the said district court to re-instate the injunction. The appellee may proceed under the condemnation statute if he be so advised.

Reversed.

SCHLUTER ET AL. V. JACOBS.

1. The return of the officer levying an attachment and execution showing that he took possession of certain chattels under the writ, and had them sold before the trial of an action to determine the title, is sufficient evidence to sustain a verdict for conversion of the property, the title to which was shown to be in complainant.
2. General Statutes, section 2011, provides for summary proceedings to try the right of property, and, if found to be in claimant, for the assessment of damages by the court or jury, and for costs. *Held*, that, having found the property to be in claimant, the court is authorized to receive evidence as to the value of the property taken, although no formal issue of value is raised by the pleadings.

10	449
12	208

10	449
19	391

10	449
23	207

10	449
10a	173

10	449
19a	224

10	449
34	358

Appeal from Gunnison County Court.

ACTION for conversion, brought by Mary E. Jacobs against Schluter & Spengel. The facts are stated in the opinion.

Messrs. GOUDY and TWITCHELL, for appellant.

RISING, C. On the 24th day of January, 1884, Schluter & Spengel brought an action in justice's court against H. H. Jacobs, in which action a writ of attachment was issued, and levied upon certain personal property. On the 5th day of January, 1884, the appellee, proceeding under the provisions of section 2011, General Statutes, for the trial of right to property, filed her affidavit with the justice before whom said action was pending, as claimant of two mares and one colt taken under said writ of attachment as the property of said H. H. Jacobs. Issue was made under the provisions of said section, and trial had before the justice, who found that the property was not the property of said Mary E. Jacobs, and entered judgment against her, from which judgment she appealed to the county court. Upon the trial in the county court the appellee recovered a judgment against the appellants for \$200 as her damages. The return of the officer who served the writ of attachment shows that, on the 24th day of January, 1884, he levied upon and took into his possession, under said writ, the property described in the affidavit of claimant. It is shown by the evidence that, at the time the writ of attachment was levied on said property, the officer making such levy had in his hands for service an execution in favor of John Bolman against the property of said H. H. Jacobs; that the levy of the execution on said property was made at the same time that the levy of the attachment was made, but that possession of the property was taken only once; that, at the time of the trial of this action in the county court, the officer making said levies had sold the property claimed by Mary E. Jacobs, under said execution levy, for the sum of \$212, that sum being sufficient to satisfy said execution, and leave in the hands of the officer the sum of \$50.25.

The third, fourth and fifth assignments of error present all the questions argued by counsel.

Under the third assignment the question of the suffi-

ciency of the evidence to warrant a finding in favor of the claimant upon the question of the right of property is raised. I think the finding as to the right of property is sustained by the evidence.

The fourth and fifth assignments raise the question whether the provisions of section 2011, General Statutes, authorized the court, under the circumstances of this case, to receive and consider evidences of the value of the property claimed for the purpose of assessing the damages sustained by the claimant. The determination of this question depends upon the construction of said section. That portion of section 2011 providing for the assessment of damages is as follows: "In all cases where, upon trial of the issues thus made, the right of property is found to be in the claimant, the damages suffered by the claimant by reason of the levy shall be assessed by the court or jury and the claimant shall recover his costs of the attaching creditor."

It is claimed by counsel for appellants that the value of the property cannot be considered as an item of damages suffered by reason of the levy, under any circumstances, in proceedings under said section. Said section provides for summary proceedings to try the right of property; and at the same time, if such right is found to be in the claimant, to assess his damages for the wrongful seizure and detention of such property. I think it was intended by such summary proceedings to settle, as between the parties thereto, all questions relating to such right and damages, and to give to the claimant all the relief he would be entitled to under any form of action. This view seems to be sustained by the case of *Turner v. Lytle*, 59 Md. 199. The statutes of the state of Maryland, upon the same subject, in their general features, are more like our statute than those of any other state that I have examined; and, so far as the two statutes affect the question under consideration, I think they are substantially the same. That portion of the Maryland

statute relating to the assessment of damages is as follows: "If the plaintiff fails to recover judgment of condemnation for the property so levied upon, the petitioner shall be awarded his costs and shall recover damages for the wrong and injury done him by reason of the illegal seizure and detention of his property." The plaintiff and defendant in the attachment suit are brought into court to try the right of property claimed by the petition of the claimant. There is a provision in the Maryland statute under which the claimant can give a bond and have the property discharged from the levy.

In the case of *Turner v. Lytle* the claimant filed his petition claiming the property seized under the attachment, gave a bond as required by the statute, and the property seized was discharged. The plaintiff in the attachment suit appeared and contested the claimant's right to the property. Upon the trial of this issue the claimant offered evidence to prove that he was damaged by reason of the seizure and attachment, and the extent of said damages, which evidence was admitted by the court, against the objection of the plaintiff. The claimant obtained a judgment for the property, and for \$100 damages. Upon appeal the appellant, the plaintiff in the attachment suit, contended that no damages were claimed in the petition, and, there being no issue in that regard, no evidence could be admitted of or recovery had for damages. In the opinion, construing the statute under which the proceedings were had, the court say: "The main object of the statute was to establish a form of proceeding which would give full redress in one proceeding for the wrongful taking by attachment or by execution of another's property. The language of the statute very clearly, we think, indicates that both the right to the property, and damages for its seizure and detention, is to be settled in this summary proceeding, if it is resorted to. We do not mean to decide that the claimant is compelled, if he knows of the levy and seiz-

ure, to resort to this method of asserting his rights to secure the property and recover damages. It is not necessary for us to decide that question; it is not before us. But what we do decide is that, if resort be had to this method, both the right of property and the damages are then and there to be settled. That all questions as to property may be definitely decided, both the plaintiff in the judgment and the defendant in the judgment are to be notified of the claim, and summoned, that the claimant's right may be contested by either; and it is expressly stated in the latter clause of the second section that the claimant, if he succeeds, shall not only have his costs, but damages he has suffered. The language is: 'The petitioner shall be awarded his costs, and shall recover damage for the wrong and injury done him,' etc. The fact that the petition in terms does not claim damages makes no difference. Regarded as a question of pleading merely, the petition is sufficient by complying with the requirement of the statute, which substitutes the statement of the petitioner's right, as here presented, for the more formal pleading of another form of action. Substantial conformity to the requirement of the special proceeding created is all that can be required. The law itself affects the parties, plaintiff and defendant, in the attachment, with notice of what may be tried, and takes the place of the more formal notice ordinarily found in the pleadings."

The statute here construed is practically the same as our statute, and it seems to me that the construction given it in the case cited is the proper construction to be given to our statute. Under this view of the statute there is no error in the judgment, unless the damages assessed are greater than the actual damages suffered by the claimant by reason of the levy. The amount of the damage sustained must be ascertained from the evidence.

The evidence shows that the property of the appellee was levied upon, and taken into the possession of the

officer, under a writ of attachment issued at the suit of appellants. It is well settled that the taking, by attachment, of personalty not the property of the defendant in the attachment is a tortious taking, and constitutes a conversion of such property. *Drake*, Attachm. § 196; *Meade v. Smith*, 16 Conn. 346-366; *Woodbury v. Long*, 8 Pick. 543; *State v. Doan*, 39 Mo. 44-50. The provisions of section 2011 make the attaching creditor liable for such conversion. When the claimant succeeds he shall recover his costs of the attaching creditor. Costs and damages must be awarded against the same party and at the same time. But, if the statute did not so provide, still the attaching party must, in this case, be held liable for the acts of the officer, by reason of his ratification of the taking by the officer by contesting the claim of the defendant in error. *Perrin v. Claflin*, 11 Mo. 13. The measure of damages for a conversion is generally the value of the property converted, with interest thereon from the time of the conversion. *Field*, Dam. § 792. The evidence in the case would have warranted a judgment for a larger sum. At the time the claimant instituted proceedings under section 2011 she was entitled to recover, from the plaintiffs in the attachment suit, the value of her property, upon establishing her right to such property. The evidence shows, not only that the property was not returned to the claimant, but that it had been sold under the execution levy, and so placed beyond recovery by the claimant or the attaching creditors. The conversion of the property was consummated by the taking. The return of the officer on the writ of attachment shows the taking. The plaintiffs in the attachment suit do not deny the taking, but contest with the claimant their right to the property under such taking. No act of any wrong-doer can relieve the appellants from their liability for wrong done the claimant in taking her property. *Farrar v. Talley*, 4 S. W. Rep. 558. Under the circumstances of this case, the execution and attaching

creditors are to be treated as joint trespassers, and the interpleading claimant was at liberty to look to either or both for indemnity. *Stone v. Dickinson*, 5 Allen, 29.

The judgment should be affirmed.

We concur: MACON, C.; STALLCUP, C.

BY THE COURT. For the reasons assigned in the foregoing opinion the judgment of the county court is affirmed.

Affirmed.

BUCKINGHAM V. HARRIS.

1. A real estate broker is entitled to his commission when he has procured a party ready to purchase on the owner's terms, though he has not made a binding contract for the sale of the real estate with such person.
2. In an action by a real estate broker for his commission, it was shown that he procured a purchaser who was ready and willing to pay the price set upon the land in the broker's hands for sale by the owner thereof, and that the only reason the owner would not sell was because the commission asked by the broker, being the same provided by his contract with the owner, was more than the owner wished to pay, and that the owner had concluded to hold for a higher price. *Held*, that the broker had performed his part, and was entitled to his commission.
3. It is not error to admit evidence of the value of services performed by a real estate broker in corroboration of his statement as to the express agreement for such services, and to support an allegation of the express agreement contained in the complaint.
4. An instruction that conduct which imputes bad faith upon the part of an agent to sell real estate must be shown by the party claiming it; an instruction that the burden rests upon him to prove such conduct is not error.
5. The admission in rebuttal of evidence which has been shown in chief, or which, more properly, should have been introduced in chief, is not error, as it is a matter within the discretion of the court.

Appeal from District Court, Larimer County.

AN action brought by Jesse Harris to recover his commission as a real estate broker, claimed to have been

10	455
16	272
10	455
18	499
1a	255
10	455
7a	531
10	455
25	225
10a	524
10	455
32	432
18a	209

earned by finding a purchaser for land belonging to Charles G. Buckingham, defendant.

Messrs. DUNNING and HAYNES, for appellant.

Messrs. RHODES and LOVE and E. A. BALLARD, for appellee.

STALLCUP, C. Appellee was plaintiff below, and recovered judgment. The questions presented for consideration by the twenty errors assigned for the reversal thereof may be arranged as follows: *First*. Was the evidence sufficient to warrant the verdict and judgment? *Second*. Was there error in the instructions to the jury given by the court, or in the refusal to give those requested by appellant? *Third*. Did the court err to the prejudice of the appellant in the rulings on the introduction of evidence at the trial?

First, to the evidence. As to the employment of appellee to sell this four hundred and eighty acre tract of land, the appellee's evidence is direct to that effect. It is corroborated by the testimony of the witness Norvell, and the acts of appellee in working up a purchaser for the same, and in a measure is conceded by appellant. So, from the whole evidence, the jury was warranted in finding that the appellant, desiring to sell his land, had employed the appellee, a real estate broker, to procure him a purchaser at a certain price per acre, on terms stated, for which service he had agreed to pay him a certain commission.

As to appellee's performance of his part of the undertaking, it is shown by the evidence that appellee did procure a purchaser in Mr. Rhodes, who was willing, anxious and able to take the land on the terms given by the appellant, viz., \$40 per acre, subject to the lease upon it,—one-third cash, balance in one and two years, secured, etc. The evidence discloses but one reason for not consummating the sale; that was, the refusal on the part of

appellant to complete the sale on his part. The only reasons given for this refusal were: *First*, that appellee would not accept for his commission two and one-half per cent. on the amount of the sale; and, *second*, that appellant had concluded to hold the land for a higher price. As to the commission or compensation appellee was to receive for his services in procuring a purchaser, the evidence for appellee seems conclusive that it was to be five per cent. That is the amount stated by appellee to appellant at the time of the employment, and then tacitly acquiesced in by appellant, and afterwards, during negotiations for sale, was spoken of by appellant as the understood rate; so that the contract of employment, and the performance thereof by appellee, are shown by the evidence for appellee. There was some conflict in the evidence as between appellant and appellee and his witnesses; but the jury's verdict settled that in favor of appellee, and we accordingly accept the facts. From these conclusions it follows that appellee performed his part of the undertaking, and is entitled to his commission, the same as if the sale had been completed. In the case of *Doty v. Miller*, 43 Barb. 529, the law is stated that a broker or agent who undertakes to sell property for another for a certain commission, when he finds a purchaser willing to purchase at the price, has earned and can recover his commission, though the sale was never completed, if the failure to complete the same was in consequence of a defect of title, and without any fault of the broker or agent. In the case of *Delaplaine v. Turnley*, 44 Wis. 31, the law is stated that if a broker, employed to sell property at a price satisfactory to his principal, produces a party ready to make the purchase at a satisfactory price, or to make an exchange satisfactory to the principal, the latter cannot relieve himself from liability to the broker for commission by a capricious refusal to consummate the sale. In the case of *Moses v. Bierling*, 31 N. Y. 462, the law is stated that,

until the broker has faithfully discharged the obligation assumed in the contract, he is not entitled to the agreed commission; that a broker employed to make a sale is entitled to his commission when he produces a party ready to make the purchase, and the principal cannot relieve himself from liability by a capricious refusal to consummate the sale, or by a voluntary act of his own disabling him from the performance. In the case of *Hart v. Hoffman*, 44 How. Pr. 168, the law is stated that where a broker, employed to sell real estate, procures a party willing to purchase on the owner's terms, and the owner refuses to convey to the party so procured, the law will presume, in the absence of evidence to the contrary, that the person so procured was solvent and pecuniarily able to perform the contract he offered to make.

As to the instructions given and denied. The following were the instructions given at the request of appellee, and excepted to by appellant: "*First*. If the principal rejects the purchaser, and the broker claims his commission, he (the broker) must show that the person furnished by him (the broker) to make the purchase was willing to accept the offer precisely as made by the principal, and that he was an eligible purchaser, and such a one as the principal was bound in good faith, as between himself and the broker, to accept. *Second*. When an agent or broker in good faith has produced a purchaser who is acceptable to the owner, and able and willing to purchase on terms satisfactory to the owner, or as offered by the owner, he has performed his duty; and if, from any failure of the owner to enter into a binding contract, the sale is not completed, the agent may recover his commission." There is no error in these instructions, as they are in accord with the law applicable to the case as shown by the cases herein cited, and *Finnerty v. Fritz*, 5 Colo. 174; *Smith v. Fairchild*, 7 Colo. 510.

The following instruction was asked on the part of appellant: "If the jury believe from the evidence that the

plaintiff was authorized by the defendant to negotiate a sale of the premises in question upon certain terms, and the plaintiff, either knowing or having reason to believe that he could obtain a purchaser at those terms, sought to induce the defendant to accept a less price than that defendant had so proposed, the plaintiff by such conduct forfeits the right to any commission," — which the court gave with the following modification: "But the burden of proof in this matter of defense is upon the defendant," — to which modification the appellant excepted. We see no error in this modification. The charge imputes bad faith in some way, and thereby an avoidance of liability. Bad faith and fraud are not presumed. To defeat a liability thereby, they must be shown, and by him who so seeks to defeat the liability.

The following instruction was requested by appellant: "The jury are instructed that a broker is not entitled to a commission until he has completed a valid contract of sale, binding upon both the vendor and vendee; and if you believe from the evidence that no contract in writing or otherwise had been made, whereby the defendant could have enforced the collection of the money from the alleged vendee, you should find for the defendant," — which instruction was refused; to which refusal appellant excepted, and it is strongly urged here that, by the law, appellant was entitled to this instruction. It is true that there are a few authorities sustaining the view stated in the instruction (*Richards v. Jackson*, 31 Md. 250; *De Santos v. Tuney*, 13 La. Ann. 151); but such view is unreasonable; for, if such were the law, a broker could not consummate a sale, or make a binding contract of sale, so as to be entitled to commission, without the owner had vested him with power over the title. In the general employment of a broker to sell real estate, no such power is given; and it is not necessary, and should not be necessary, to give it, as it would open a channel for confusion and fraud. The owner does not wish to part with

the control of his property; simply to obtain the aid of a broker to sell it. He employs a broker to procure a purchaser, retaining in himself the power to make binding contracts and conveyances. The terms of sale are sufficient for the broker. So, in the general employment of a broker, when he procures a purchaser able and willing to buy at the terms stated by the owner, he has performed his part; he has done all he can do, and all he was employed to do. The owner may decline to convey or complete the sale. He may so decline for the reason that he may get more by holding and raising his price, or for any other reason; but this does not and should not relieve him from his liability to pay his broker for his services in procuring a person able, ready and willing to purchase at the terms given, the same as if he had completed the sale. Such is the character of the general employment of a broker in the sale of real estate, and it seems reasonable and just, and is supported by the weight of authority upon the subject, as may be seen by the cases first above cited, as well as the following: *Alexander v. Breeden*, 14 B. Mon. 125; *Martin v. Silliman*, 53 N. Y. 615; *Neilson v. Lee*, 60 Cal. 555; *McGavock v. Woodlief*, 20 How. 221; *Lloyd v. Matthews*, 51 N. Y. 124; *Fisk v. Henarie*, 9 Pac. Rep. 322; *Bell v. Kaiser*, 50 Mo. 150; *Hamlin v. Schulte*, 27 N. W. Rep. 301; *Goss v. Brown*, 31 Minn. 484; 18 N. W. Rep. 290; *Mooney v. Elder*, 56 N. Y. 238; *Coleman v. Meade*, 13 Bush, 358.

As to the rulings of the court at the trial. It is assigned and argued that the court erred in admitting the evidence of the appellee and the witness Norvell as to the value of services in the sale of real estate, and the customary charges and commissions upon such sales. It is alleged in the complaint that, by the terms of the employment, appellant agreed to pay five per cent. This evidence showed that the customary rate was five per cent. The admission of evidence so variant from the allegations of the complaint is urged here as cause for

reversal of the judgment. In view of all the evidence, together with the character of the contest, we do not think this evidence was of the character to surprise, prejudice or mislead appellant. In the case of *Sussdorff v. Schmidt*, 55 N. Y. 320, on this point, the law is stated thus: "Under a complaint to recover an alleged agreed compensation for services, a recovery upon proof of and for the value of the services is sustainable. At most, it is but a variance between the pleading and proof, which may be disregarded, unless it appears that it misled the defendant." And section 81 of our code provides that such error shall be disregarded: "If the opposite party is by such variance surprised or misled, the court may on terms allow an amendment of the pleading to conform to such proof." No surprise was even claimed here; so it is apparent that such error is insufficient to warrant a reversal of the judgment.

It is assigned and argued that the court erred in admitting the testimony of the witness Rhodes about the letters from Doty, and in refusing a rule on witness Rhodes to produce the letters. The testimony in this regard was as follows: (By appellant's counsel.) "*Question.* Mr. Rhodes, were you acting for yourself, on your own behalf, in making this purchase; were you acting for yourself or somebody else? *Answer.* I was acting for myself in a certain sense. I can explain that if you wish it explained. *Q.* Well, sir, I would like to have it explained. *A.* Well, we bought some lands here, Mr. Doty and myself, west of town, and were willing to buy some more if we thought we could get some that would pay. I had an arrangement with Mr. Doty by which I could get the money by drawing on him in New York to pay for land that I would see fit to buy and thought was reasonable, leaving it to my judgment to say whether it should be purchased or not. *Q.* Was this arrangement in writing, Mr. Rhodes? *A.* I think I had some letters from Mr. Doty to that effect, and Mr. Doty was here

himself. Q. How long before this transaction was it that Mr. Doty was here? A. Doty had been here, I think, through the summer. I don't know how long, exactly. I was corresponding with him all the time. Q. You had a talk with him about this transaction? A. This particular piece of land? Q. Yes, sir. A. No, I think not. Q. You were corresponding with Mr. Doty? A. Yes. Q. After the time he went away, up to the time of this transaction? A. Yes, off and on. Q. About making these investments? A. Not so much about that as if I was to find any property that was cheap, that we thought some money could be made out of, he would furnish the money to buy it. That was a personal matter between Mr. Doty and myself." Motion was here made by appellant's counsel that the testimony about what the letters contained be struck out. Denied by the court. "Question. Have you those letters, Mr. Rhodes? Answer. I have a great many letters from Mr. Doty. Q. On a former trial of this case, do you remember of producing a certain letter which you claimed was your authority from Mr. Doty? A. No, sir; I don't think I presented a letter as my authority for buying this place. I presented a letter in which Mr. Doty said something about drawing on him if I wanted money. It had nothing to do with the purchase of this place. Q. You never had any letter relating to this place? A. No; I never corresponded with him in relation to this place. My arrangement with Mr. Doty was that I should get the money on my judgment if I wanted to buy real estate. Q. That letter which you have referred to was in relation to this arrangement that you now speak of, wasn't it, Mr. Rhodes? A. No; I don't think it was. Q. Have you that letter? A. I don't know whether I have or not." Upon which a motion was made by appellant's counsel for a rule to produce the letters, and denied. There was no error in these rulings, as it appears from the evidence in the case that Rhodes had arranged for the down payment, and

was going to take title to himself, so that his relations with Doty were immaterial to the parties to this case.

In rebuttal, over the objections of appellant, certain questions were answered by appellee Harris as follows: "*Question.* Did you state to Buckingham at the time of this first conversation with him that you could not sell the land subject to the lease? *Answer.* No, sir; I think not. I said to him that it would be difficult to sell it subject to the lease. *Q.* When did Rhodes first offer you \$40 an acre? *A.* After we arrived at Boulder, at Brainard's Hotel. *Q.* The defendant testified that you offered him \$37.50 per acre instead of \$40. *A.* I offered him \$40, and he remarked that \$960 was a good deal of commission, and he wanted me to accept two and one-half per cent. I refused to do so. *Q.* Did you have any conversation with him at the house about his taking \$37.50 per acre? *A.* There was nothing; I said nothing in regard to \$37.50 at his house." It is urged here for appellant that these questions and answers were not admissible in rebuttal, for the reason that they were of the premises previously gone over in chief, and that the court erred in admitting the same. It will be seen that they were in the main responsive to, and contradictory of, independent and affirmative statements made by appellant in his testimony of matters not previously disclosed, and impossible of contradiction except in rebuttal. Besides, it is always within the discretion of the court to admit, in rebuttal, evidence which in strictness should have been produced in chief. *Smith v. Mayer*, 3 Colo. 210.

The judgment should be affirmed.

We concur: MACON, C.; RISING, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

Affirmed.

JONES V. BANK OF LEADVILLE.

1. Courts have no jurisdiction to appoint a receiver except in a suit pending in which the receiver is desired.
2. The appointment of a receiver does not dissolve a corporation either in law or in fact.
3. The surrender of the franchise of a corporation is not an official act, but to be effectual must be the act of the stockholders as such.
4. In the absence of equity jurisdiction, properly invoked, the assets of an insolvent corporation do not constitute a trust fund for *pro rata* distribution among all its creditors, nor in such case does any superior equitable lien exist as against a prior attaching creditor.

Error to District Court, Lake County.

ON the 25th day of July, 1883, the defendant in error was, and had been, a bank doing a general banking business in the city of Leadville, and on that date presented to the Hon. L. M. Goddard, judge of the fifth judicial district of Colorado, its petition in the words and figures following:

“In the matter of the application of the Bank of Leadville to the court to dissolve its corporate existence, close up the business thereof, and for the appointment of a receiver.

“*To the Hon. L. M. Goddard, Judge of the District Court:*

“The petition of the Bank of Leadville respectfully shows to the court: That heretofore on, to wit, the 21st day of August, 1878, the above-named petitioner became and was duly incorporated under the laws of the state, as a banking corporation, and thereupon, upon the filing of its said articles in the proper offices, entered upon the transaction of a general banking business.

“That since said time your petitioner has been largely engaged in said business, and to-day has upon its books, as due to depositors, upward of the sum of \$200,000.

“That said petitioner is also indebted to divers and sundry parties in large amounts, upon divers large and sundry amounts in the sum of upwards of \$50,000. Schedule of which several indebtednesses will be hereafter filed in court and furnished to any receiver appointed herein.

10	464
19	212
10	464
10a	439
10a	506
11a	502
10	464
20	155
10	464
18a	304
10	464
33	301
10	464
p35	8
38	267
38	432

“That in the transaction of such banking business heavy losses have been sustained by your said petitioner.

“That the nominal assets of the bank are very large, and are upwards of \$350,000, but of said assets a large proportion and a very considerable percentage is of no present value, and quite a considerable percentage of no value whatever if collection is to be forced.

“That a large percentage of the assets and all the capital stock of said bank has been lost in the carrying on said banking operations, and that the losses have been so great that the said bank is no longer able to carry on its said banking business, and that the funds of said bank are so far exhausted that the business of the bank, under its incorporation, can no longer be carried on.

“That the said corporation is wholly and entirely insolvent; that your petitioner desires to wind up its affairs, close its business, and secure the ratable and equitable distribution of its assets among its creditors; to retire from business, surrender its franchise, and be dissolved, and to that end seeks the appointment of a receiver.

“Wherefore your petitioner prays that by decree of this court, duly entered, the said corporation, the Bank of Leadville, may be dissolved, that its business and affairs may, under the direction of this court, be duly closed and wound up, and that to that end a receiver of its affairs may by the court be duly appointed, and for such other relief as to the court may seem meet, and your petitioner will ever pray.

“J. B. BISSELL,

“Attorney for Petitioner.”

Was sworn to by George R. Fisher as follows:

“STATE OF COLORADO, }
“*Lake County.* }

“I, George R. Fisher, being duly sworn, on oath say that I am the cashier and principal stockholder of the petitioner; that I have read said petition and know its

contents, and that the same is true of my own knowledge.

GEORGE R. FISHER."

On the same day the said judge made the following order:

"In the matter of the application of the Bank of Leadville for a receiver, etc.

"Upon the reading and filing of the verified petition of said corporation, and upon the application of counsel for said corporation, it is ordered that George W. Trimble be, and he is hereby, appointed receiver of all the estate, effects and property, both real and personal, of the said Bank of Leadville, of every shape, form and description, and wheresoever situated, with full power and authority to sue for, collect and receive any and all sum or sums due to the said bank, and to collect and reduce to cash all the estate and assets of said bank, and in so far as the same may be sufficient to pay off, liquidate and discharge the obligations of said corporation.

"That said receiver is appointed upon his executing and filing with the clerk of the court a bond in the penalty of \$50,000, with two or more sureties, each qualifying in such sum as to the total shall be double the above amount, such sureties to be approved by the clerk according to the statutes and according to the practice of this court.

"Done at chambers, at Leadville, July 25, 1883.

"L. M. GODDARD,

"Judge Fifth Judicial District."

On the 3d day of November following, Jones, plaintiff in error, filed his complaint against the said bank, claiming \$44,222.98 as due him from said bank; and on the 27th day of the same month caused summons to issue upon his complaint, which was served on the same day upon George R. Fisher as cashier, secretary and stockholder of said bank. On the same 27th day of November Jones made and filed his affidavit in attachment, and on the same day filed his attachment bond in the penal sum

of \$90,000, executed by himself and ten sureties, which is in the following form:

“Whereas, the above-named plaintiff has commenced, or is about to commence, an action in the district court of the fifth judicial district of the state of Colorado, in and for said county of Lake, against the above-named defendant, upon a contract for the direct payment of money, claiming that there is due to the said plaintiff from said defendant the sum of \$44,222.98, lawful money of the United States, besides interest, and said plaintiff is about to apply for an attachment against the property of said defendant, as security for the satisfaction of any judgment that may be recovered therein:

“Now, therefore, we, the undersigned, residents of the state of Colorado, in consideration of the premises and of the issuing of said attachment, do jointly and severally undertake in the sum of \$90,000, and promise to the effect that if the said defendant recovers judgment in said action, or if the said court shall finally decide that the said plaintiff was not entitled to an attachment, the said plaintiff will pay all costs that may be awarded to the said defendant, the Bank of Leadville, and all damages which it may sustain by reason of the wrongful suing out of the said attachment, not exceeding the sum of \$90,000.

“Dated this 26th day of November, 1883.

“C. A. JONES. [SEAL.]

“F. N. PIERCE. [SEAL.]

“C. F. DAILY. [SEAL.]

“N. P. SEELEY. [SEAL.]

“I. W. CHATFIELD. [SEAL.]

“L. R. TUCKER. [SEAL.]

“NELSON HALLACK. [SEAL.]

“CONRAD HANSON. [SEAL.]

“CHAS. B. WING. [SEAL.]

“ROBERT B. ESTEY. [SEAL.]

“GEO. H. TAYLOR.” [SEAL.]

There seems to have been no justification by the sureties, or any of them, nor any indorsement on said bond expressive of the clerk's approval thereof.

The writ of attachment was issued on November 27th, and was served the next day by delivering copies thereof to George R. Fisher as cashier, to George W. Trimble as receiver, and S. J. Warfield as a stockholder. Under the writ of attachment, divers persons were garnished as debtors of the said bank, and certain property was levied upon as the property of the defendant.

On the 28th day of November, George W. Trimble, as assignee and receiver of said bank, filed his motion to dissolve the attachment and discharge the garnishees thereunder, and release the property levied upon, for the following reasons:

“Now comes George W. Trimble, assignee and receiver of the said defendant, and named and proceeded against by the plaintiff as garnishee of said plaintiff, and as having in his possession property and assets belonging, by Thomas & Lyles and J. B. Bissell, his attorneys, appearing specially for the purposes of this motion, and moves that he be discharged as garnishee and as attachment debtor, and in all other respects and positions, and that all property levied on in his possession or standing in his name be relieved and discharged of such levy, and that the return of the sheriff as to such levy be wholly quashed and held for naught; and for reason of said motion the following is alleged:

“*First.* The bond or undertaking, with the sureties thereon, has never been approved by the clerk of this court.

“*Second.* The sureties on said undertaking have never qualified as required by section 414 of the code.

“*Third.* The said Trimble is, and since the 25th day of July, A. D. 1883, has been, the assignee of the Bank of Leadville aforesaid, and in charge of its property and effects, real and personal.

“*Fourth.* The said Trimble has since the 26th day of July, 1883, been the receiver of the said Bank of Leadville, and as such has been in possession, and has been and is entitled to the charge and custody, of the property, effects and assets, real and personal, of the said Bank of Leadville.

“*Fifth.* The said property and effects, being so as aforesaid in the custody of the said Trimble, are not subject to levy by writ of attachment or by execution.

“And in support of the third and fourth reasons assigned as hereinbefore, the affidavit of the said Trimble herewith filed is referred to.

“By J. B. BISSELL,

“THOMAS & LYLES,

“Attorneys for G. W. Trimble, specially appearing.”

This motion was supported by the affidavit of said Trimble, which was in words and figures following:

“CHAS. A. JONES, Plaintiff,	}
vs.	
THE BANK OF LEADVILLE, Defendant.	

“George W. Trimble, first duly sworn on oath, deposes and says that he is the assignee of the Bank of Leadville, by virtue of a deed of assignment made and executed by the said Bank of Leadville on the 25th day of —, A. D. 1883, said deed of assignment being made by George R. Fisher, the cashier of said bank, pursuant to instructions of the board of directors to the end, at a meeting by them held for that purpose. That said deed of assignment transferred to this affiant, in trust for the benefit of the creditors of said Bank of Leadville, all and singular its property, real and personal, and was duly recorded in the office of the recorder of deeds of said county on the 26th day of July, 1883, in book 103, page 189, of the records of said county.

“This affiant further alleges that on, to wit, the 26th day of July, 1883, he was by the Hon. L. M. Goddard, judge of the district court, appointed receiver of

all the estate, effects and property, both real and personal, of the said Bank of Leadville, of every description, wherever situate, and with full power and authority to collect or receive any and all sums due the said bank, and to collect and reduce to cash all the estate and assets of the said bank, and, in so far as the same might be sufficient to pay off, liquidate and discharge the indebtedness of the said Bank of Leadville. And this affiant further alleges that he did file the bond required by the order of said court, and according to the statutes of the state of Colorado in that behalf provided, and did immediately, and on, to wit, the 26th day of July, 1883, as such assignee and receiver of said Bank of Leadville, take full and complete possession of all and singular the property, real and personal, of the said bank into his custody and possession, and the same has so remained in accordance with the limit expressed in the said deed of assignment and the said appointment of himself as receiver; and for the purpose of both, that on, to wit, the 28th day of November, A. D. 1883, the annexed copy of a writ of attachment and copy of the writ of garnishment were served upon him by the sheriff of Lake county, both entitled in this cause and marked exhibits "A" and "B" respectively, and that the said sheriff, in virtue of the same, has levied upon the real estate in the custody of this affiant, and the title to which is, by virtue of said assignment and receivership, in this affiant, and is ordered by the plaintiff and his attorneys to take possession of all and singular the personalty in the custody of this affiant as such receiver and assignee, and contrary to the terms of said deed of assignment and the said receivership.

"That this affiant's possession of said property, and all and singular thereof, was long prior to the beginning of this suit and to the making of said levy, and that unless the said plaintiff is restrained from making further levies upon said property, this affiant will be harassed and put to trouble and expense and his possession of said prop-

erty seriously interfered with, to the detriment and disadvantage of the creditors of said Bank of Leadville, by means whereof the fund out of which their claims against the bank are to be satisfied in whole or in part will be materially diminished and reduced.

“And affiant further states that the said C. A. Jones is not and has not been a judgment creditor of the said Bank of Leadville, either by virtue of any claim directly due him from said bank or by virtue of any claim which he holds as assignee or otherwise.

(Signed)

“GEO. W. TRIMBLE.

“Subscribed and sworn to before me this 28th day of November, A. D. 1883.

“CHARLES A. HINCKLEY,

“Notary Public Lake County, Colo.”

On the 16th of February, 1884, this motion was sustained by the court, the attachment quashed, the garnishees discharged and the property levied upon released. To which ruling Jones excepted, and afterwards, on the same day, judgment was given for plaintiff against the defendant bank for \$45,242.50.

Plaintiff sued out a writ of error to review the judgment of the district court in dissolving the attachment.

Messrs. TAYLOR and BICKFORD, for plaintiff in error.

Messrs. J. B. BISSELL and C. S. THOMAS, for defendant in error.

MACON, C. Of the eleven assignments of error, four challenge the judgment of the district court in dissolving the attachment, and seven the validity of the appointment of the receiver. Plaintiff in error contends that such appointment was void, and no control over the property of defendant ever vested in the receiver, and that the court in its action on the motion to dissolve the attachment went solely upon the ground that George W. Trimble was a legal receiver and that through him the

property of the defendant bank was *in custodia legis*; while defendant in error as strenuously claims that the writ of attachment was void for want of sufficient and formal bond, and because the sureties thereon did not justify and the clerk did not approve the bond; and also that the appointment of the receiver was legal and valid and he was entitled to the possession of all property of the bank, and the issuance of the attachment was a contempt of court and void. Whether the attachment, because of the irregularities insisted upon by the defendant in error, was or was not voidable upon motion of the defendant, may be passed for the present, to inquire whether Trimble, in his assumed character of receiver, could be heard to object to the validity of the writ and bond. For if he could not, it was error to dissolve the attachment on his motion. If he was not a legal receiver, then he was a mere stranger to the suit and had no standing in court.

This brings us to the examination of the propriety and legality of his appointment as receiver, and requires a construction of the provisions of subdivisions 1 and 3, section 144 and section 145, Code of Civil Procedure. Subdivision 1 provides that a receiver may be appointed "before judgment, provisionally, on application of either party, when he establishes a *prima facie* right to the property, or to an interest in the property *which is the subject of the action, and which is in possession of an adverse party*, and the property or its rents and profits are in danger of being lost or materially injured or impaired."

Subdivision 3, that a receiver may be appointed "in such other cases as are in accordance with the practice of courts of equity jurisdiction." Section 145 provides that "the application for the appointment of a receiver shall be made by filing a petition at any time *in the action in which a receiver is desired*, setting forth the facts upon which the application is based, which petition shall be

verified as complaints are required to be by this act. And the party opposing the appointment of a receiver shall do so by filing an answer to the petition verified as answers to complaints are required to be by this act." * * *

If these provisions are anything more than a codification of the law and practice governing the appointment of receivers before this enactment, it is difficult to perceive where the difference lies; and to determine to what facts the court will apply this statute, we are compelled to look to the practice and law as it was heretofore.

Hitherto it has been the universally accepted opinion that courts have no jurisdiction to appoint a receiver except in a suit pending in which the receiver is desired — unless in cases of idiots, lunatics and infants, which, as Lord Hardwicke says in *Ex parte Whitfield*, 2 Atkins, 315, is "a particular jurisdiction." The doctrine is applied in *Baker v. Backus*, Adm'r, 32 Ill. 95; *Davis v. Flagstaff Co.* 2 Utah, 92; *Hardy v. McClellan*, 53 Miss. 507; *Hugh v. McRea*, Chase's Dec. 466; *The French Bank Case*, 53 Cal. 550; *Kimball v. Goodburn*, 32 Mich. 10; *The People v. Jones*, 33 id. 303; and High on Receivers, sec. 17, and cases cited in note. Our statute certainly contemplates the same thing. Its plain intent is that there shall be a controversy between two or more adverse parties moved in the court, involving some conflicting and hostile claims to property that is, at least in part, the subject-matter of the litigation. It is evident that in the mind of the legislature it was necessary to this jurisdiction that there should be some party in all these proceedings who was adverse to the defendant, and whose rights to certain property were to be protected and adjudicated. It is impossible by any process of reasoning to construe the statute so as to make it apply to any case in which an action (in the ordinary definition of the term) is not pending. To hold that courts of equity can entertain jurisdiction to appoint a receiver of property as the substantive ground and ultimate object and purpose

of the suit, on the petition of the owner of the property to be controlled and protected, would be to make them the administrators of every estate where the owners thereof were incapable or unwilling to administer them themselves.

When Trimble was named by the court as receiver of defendant in error, no suit was pending against the bank; no one claimed to own or have any interest in the specific property of the bank except the bank itself; no one was before the court claiming the right to have the assets of the bank protected and preserved until he could establish a right thereto, adverse to that claimed by the bank; so far as is disclosed by the record, every one admitted the full and complete ownership of all the property claimed by the defendant in error to be in it. But apparently fearing suits and attachments, defendant asked the court to become the custodian of its effects and property, in fact its assignee for creditors. The court accepted the trust through Trimble as receiver. This it could not do. Such jurisdiction is not found in either the general powers of a court of equity, nor in the statute referred to. If, therefore, there is no other warrant for this action of the court, the appointment of Trimble as receiver was void, and he had no authority in the premises, and no right to be heard to object to the attachment proceedings in this case.

Defendant in error, however, claims that section 258 of the incorporation act is warrant for the appointment of this supposed receiver. This section is as follows: "If any corporation, or its authorized agent, shall do any act which shall subject it to a forfeiture of its charter or corporate powers, or shall allow any execution or decree of any court of record for a payment of money, after demand made by the officer, to be returned no property found, or to remain unsatisfied for ten days after such demand, or shall dissolve or cease doing business, leaving debts unpaid, suits in equity may be brought against all persons

who were stockholders at the time or liable in any way for the debts of the corporation, by joining the corporation in such suit, and each stockholder may be required to pay such debts or liabilities to the extent of the unpaid portion of his stock; and courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation; to appoint a receiver therefor, who shall have authority, by the name of the receiver of such corporation (giving the name), to sue in all courts, and to do all the things necessary to close up its affairs as commanded by the decree of the court."

We are unable to see how this statute can be made to authorize this action. In it is found an extension of the ordinary jurisdiction of courts of equity, which it is well known have no inherent power to dissolve corporations, and never exercise such jurisdiction unless it has been conferred by statute. The first part of the section provides a remedy for creditors and specifies the contingencies upon which the remedies may be enforced, and then proceeds to give the jurisdiction alluded to. But this enlarged jurisdiction to dissolve corporations is to be exercised only for "*good cause*," and upon such dissolution a receiver may be appointed, if there is any good cause for one.

But what is good cause for dissolving a corporation? The statute is silent on this subject, and we must go to some other source of information for an answer to this inquiry. We do not find in our statute on corporations any specific grounds enumerated for a dissolution of a corporation. But it is unnecessary to go into that question here, for the district court did not dissolve, nor attempt to dissolve, the defendant corporation. The decree leaves the existence of the corporation untouched and intact, and makes the appointment of the supposed receiver the end and sole purpose of its decree. The position attempted to be maintained by defendant in error, that the appointment of a receiver is *ipso facto* and *de*

jure a dissolution of the corporation, is utterly unsound. The appointment of a receiver does not dissolve a corporation either in law or fact. *Taylor v. Columbian Ins. Co.* 14 Allen, 353. Nor does the mere insolvency of a corporation, or placing it in insolvency under the statutes for that purpose, dissolve it. *A. & A. Corp.* sec. 770; *Cohen v. B. P. N. M. Co.* 10 Gray, 243.

If even it should be granted that the appointment of a receiver was a virtual dissolution of the corporation, we are brought back to the original proposition that such appointment must be made in a suit pending, and unless so made is without jurisdiction and void.

The case is not affected by the fact that defendant in error applied to the court for a decree for its own dissolution. It is seen that the court did not so decree, nor can the petition of defendant be treated as a surrender of its franchises and extinguishment of its corporate existence; because, from the facts as shown in the case, no one attempted to make the surrender except Geo. R. Fisher in his official capacity in the company as cashier.

The surrender of the franchises of a corporation is not an official act, but to be effectual must be the act of the stockholders as such. *A. & A. Corp.* sec. 772; *Smith v. Smith*, 3 Desaus. 575. In this case it is said:

“Among the methods by which corporations may be dissolved, that of a surrender is enumerated in the law books, and doubtless when the whole body of the corporation choose to surrender its rights, it is at liberty to do so, and it will be valid; but a majority must concur who have an interest or right; and officers of a corporation, or an integral portion of it, as we have before stated, are not the corporation; they have no right to make the surrender; and if they make the attempt by an act or declarations, it is an inefficient act; it is not obligatory on the corporation, which retains its full rights, existence and legal character.”

The same doctrine is affirmed in *N. O. & Jack. R'y Co.*

v. Harris, 27 Miss. 517, and *Keen v. Johnson et al.* 9 N. J. Eq. 401.

It nowhere appears in the record that any other member of the corporation than Fisher proposed a dissolution of this corporation. If, however, every member of the defendant company had joined in the petition to the district judge in this case, he could not have granted the prayer thereof, for the obvious reason that neither has the chancellor nor a court of equity in this state any jurisdiction to accept the surrender of corporate franchises, and administer on the estate of such decedents. Such a jurisdiction would leave the courts of the country no time to attend to the other business for which they were created.

If there was any defect in the proceeding for the writ of attachment, such defect made the writ voidable only, and the order of the court should have allowed such amendments as would have cured the defects. The bond is, in our opinion, sufficient, and the failure to take the justification of the sureties was at most but a misprision of the clerk, which by rule upon him could have been corrected. We do not think the omission of the clerk to indorse on the bond his approval was fatal. Civil Code, sec. 121.

The judgment should be reversed and the cause remanded, with directions to proceed in the case according to law.

RISING, C., concurs; STALLCUP, C., dissents.

Reversed.

For the reasons assigned in the opinion of Commissioner MACON the judgment is reversed and the cause remanded.

PETITION FOR REHEARING.

PER CURIAM. In support of the jurisdiction of the district court to appoint a receiver for the defendant in

error, it is earnestly argued that in the opinion filed the court mistook both the facts and the law.

One of the errors of fact pointed out is the assumption that no one acted for the corporation, in the matter of the application for a receiver, "except George R. Fisher, in his official capacity in the company as cashier," whereas the petition filed was the petition of the corporation, being only verified by its cashier. Another objection is that the opinion assumes a final decree was rendered in the equity proceeding, which did not dissolve or attempt to dissolve the corporation, whereas no final decree was rendered in that proceeding, but an interlocutory or provisional order merely, appointing the receiver, so far as disclosed by the records before this court.

The language of the opinion may be liable to criticism in the instances referred to, but if the district court was without jurisdiction to either appoint a receiver for the bank upon its petition, or to dissolve the corporation and close up its affairs, no ground exists for a rehearing.

Conceding, then, as we think the opinion in fact does, that the petition filed was the petition of the corporation, an essential prerequisite to the jurisdiction of the court or judge to appoint a receiver was that there should be *an action pending*. We think this prerequisite was lacking. The authorities agree that the general jurisdiction of courts of equity does not extend to the dissolution of corporations and the administration of their affairs, but that such powers, where they exist, are statutory. Accepting this as the correct doctrine, the question is, Do our own statutes sustain the jurisdiction assumed in the present instance?

The corporation act (sec. 258, Gen. St.) confers power upon the state courts to dissolve or close up the affairs of corporations; to appoint receivers for them, and to do all things necessary to closing up their affairs. But this section, construed by the ordinary rules of interpretation, indicates plainly that an adversary, and not an *ex parte*,

proceeding is contemplated by the legislature in its enactment.

The only other statutory authority for the appointment of a receiver is found in section 144 of the Code of Civil Procedure, which authorizes the appointment to be made, in the cases specified therein, "*by the court in which the action is pending, or by a judge thereof.*"

It is not claimed that there was an adversary proceeding in the present case, but it is claimed that there was *an action pending* when the appointment was made.

"The vital idea of an action," says Mr. Bouvier, "is a proceeding on the part of one person as actor against another, for the infringement of some right of the first, before a court of justice in the manner prescribed by the court or the law." We think this definition is in accord with the general understanding of the meaning of the term, and that, to constitute an action in court, there must be not only a petitioner or complainant, but a respondent or defendant.

There being but one party to the proceeding in this case, it follows that the statutory jurisdiction could not be invoked.

Another objection to the jurisdiction in this case, mentioned by Commissioner MACON in his opinion, is that an insolvent party cannot come into a court of equity, and upon its own motion authorize the court to assume the administration of his estate. An attempt has been made to answer this objection in the petition for rehearing, and briefs filed in support thereof, but in our judgment without success. The authorities cited are not directly in point, while very respectable authority is adverse to the jurisdiction. Says Justice Campbell in *Kimball v. Goodburn*, 32 Mich. 10: "It is also claimed that the assets were in the hands of a receiver who had never been discharged. * * * The evidence of confirmation is wanting. But the order appears to have been made in a proceeding wherein the Bushwick Company itself appears

to be complainant, and we are aware of no case where a corporation in its corporate capacity and name can apply to be put in the custody of a receiver."

A similar application to the one made in the present case, except as to parties, was presented to Chief Justice Chase, when sitting at the circuit in South Carolina, in 1869. The State Bank of South Carolina filed a bill setting up that it was insolvent; that certain judgment creditors, who were made parties to the bill, were about to procure an inequitable preference over its other creditors by means of executions which they were enforcing, and praying an injunction that receivers be appointed, etc. The chief justice dismissed the bill, saying, among other things: "The court is not aware of any case which will warrant its assuming the administration of the estate of a debtor simply on the ground of insolvency. * * *

A creditor in a proper case might come into a court of equity for the appointment of a receiver, but a debtor could not; this, therefore, is not such a case as calls for the interposition of the court, and the prayer of the bill cannot be granted." *Hugh v. McRae*, Chase's Dec. 466.

The further point is made in the petition for rehearing, that the motion to dissolve the writ of attachment sued out against the bank by plaintiff in error, and levied upon the property in possession of Trimble, was not based alone upon the receivership of Trimble, but upon his appointment as assignee of the bank as well, which latter right to the custody of the property was ignored in the opinion filed. While the above statement is correct, as shown by the record, it does not appear that the deed of assignment was introduced in evidence on the hearing of the motion to dissolve the attachment and to discharge the bank property. This claim of Trimble to the possession of the property was treated, therefore, as not being properly before the court, since the court was not able to judge of its validity, the deed of assignment not being introduced in evidence. The point decided

in this connection was that the order appointing the receiver was without jurisdiction and void.

Another doctrine urged in the original arguments, and which is strongly contended for upon the application for a rehearing, is that the assets and funds of an insolvent corporation constitute a trust fund for *pro rata* distribution among all its creditors, and that an equitable lien thereon exists in favor of all the creditors superior to any liens which can be acquired by attachment proceedings in favor of individuals. After careful examination of the numerous authorities cited to the proposition, including as well the provisions of our own statute bearing upon the question, we are unanimously of the opinion that no such superior lien exists until the jurisdiction of a court of equity has been properly invoked and lawfully exerted for the protection of such assets and the administration of the affairs of the insolvent. The writ of the plaintiff in error in this case having been sued out and levied upon the property of the bank before the equitable jurisdiction of the court lawfully attached thereto, he must be held to have acquired a prior and superior lien, so far as the judicial proceedings had for the appointment of a receiver are concerned. Whether Trimble was entitled to the possession of the property by virtue of an assignment to him for the benefit of the creditors generally is not decided.

The petition for rehearing is denied.

Petition denied.

CALDWELL V. DAVIS.

1. The relation existing between partners is one of trust and confidence. When dealing with each other in relation to partnership matters they are required to make full disclosure of all material facts within their knowledge in any way relating to the partnership affairs.

2. To entitle a party to the protection accorded to privileged communications, the communications must have been made to the counsel, solicitor or attorney acting, for the time being, in the character of a legal adviser, and must be made by the client for the purpose of professional advice or aid upon the subject of his rights and liabilities.

Appeal from District Court, Dolores County.

APPELLANT in his complaint alleged a copartnership between himself and defendant, formed for the purpose of buying and selling an option of the Bullion, Hidden Treasure and Cleveland mining claims; that on the 19th day of April, 1880, H. S. Rutan, Stillman P. Norton and Ebert Norton, the owners of said mining claims, made to E. L. Davis and H. J. Caldwell, appellee and appellant herein, a bond conditioned to convey said claims to said Davis and Caldwell, upon payment by them of the sum of \$7,500 on or before July 22, 1880, in consideration of the sum of \$500 paid by said Davis and Caldwell; that plaintiff went east and expended a large sum of money, to wit, the sum of more than \$700, in endeavoring to sell said claims; that during plaintiff's absence from this state endeavoring to make such sale, the defendant negotiated a sale of an undivided one-half of said mining claims to Jacob Ohlwiler for the sum of \$8,000, and that said agreement of sale was afterwards carried out; that, upon the return of plaintiff to this state, and on the 12th day of July, 1880, the defendant, with intent to defraud the plaintiff, fraudulently suppressed and concealed from plaintiff that he had made said agreement with Ohlwiler, and kept plaintiff in total ignorance thereof, and said nothing to plaintiff about his having sought or found a purchaser for said claims, and represented to plaintiff that he had not succeeded in finding a purchaser, and that he desired to purchase said mining claims for himself; that plaintiff, relying wholly upon the good faith, honor and integrity of the defendant, and in total ignorance of said sale to Ohlwiler, assigned all his interest in

said bond and property to the defendant for the sum of \$500 and a horse of the value of \$100; that, at the time said assignment was made, there was no accounting or settlements between plaintiff and defendant as to their said partnership affairs, and that there never has been such an accounting or settlement; that, on the 13th day of July, 1880, the said owners of said mining claims made, executed and delivered to defendant, and to said Jacob Ohlwiler, deeds to the whole of said mining claims, share and share alike; that said Ohlwiler paid all of the consideration therefor, being the full sum of \$8,000, and that defendant paid no consideration therefor, but that he obtained an undivided one-half interest in and to each of said claims, and the sum of \$500, on account of and by means of said option or title bond on said mining claims; that said undivided one-half of said mining claims and said \$500 are gains and profits legitimately accruing to said copartnership; and plaintiff asks that an accounting may be had between plaintiff and defendant as to all partnership transactions regarding said option and mining claims, and offers to pay to defendant any sum that may be found due from the plaintiff to defendant, but charges the fact to be that defendant will be found to be a debtor to the plaintiff on such accounting; that suspicion of the fraud was first raised in the plaintiff's mind in the summer of 1882, but that the facts were not discovered until the fall of 1882, and that this suit was instituted as soon after such discovery as the nature of the case would admit. Prayed the judgment of the court that said assignment from plaintiff to defendant be declared fraudulent and void; that an account be taken of all copartnership dealings and transactions; that said partnership be dissolved; and that defendant be adjudged to convey by deed to the plaintiff an undivided one-quarter interest in and to each of said mining claims.

Defendant, in his answer, denies the copartnership; denies that, during the absence of the plaintiff from this

state, defendant succeeded in finding a purchaser for any portion of said claims, or made with Ohlwiler any agreement as to a sale of said claims or any interest therein; denies any intent to defraud plaintiff, or that he fraudulently suppressed or concealed the fact of having made any agreement for the sale of said claims or any interest therein; denies that he induced the plaintiff, by any fraudulent concealments or false representations, to make the assignment to him; alleges that, by agreement between plaintiff and defendant, the duty of selling said claims devolved solely on the plaintiff; alleges, upon information and belief, that plaintiff acquired full and complete knowledge of all circumstances surrounding and affecting the acquirement by said Ohlwiler of an interest in said claims.

Replication of plaintiff denies that the duty of selling said mining claims, or any part thereof, devolved solely upon the plaintiff; denies that in the month of July, 1880, he had knowledge of the circumstances of the sale to Ohlwiler, and avers that he did not and could not obtain such knowledge until eighteen months after such date.

Trial to the court and judgment for defendant, from which plaintiff appealed.

The evidence shows that Davis and Caldwell entered into an agreement to get a bond on the Bullion, Hidden Treasure and Cleveland lode mining claims for the purpose of selling the option so acquired at a profit; that they obtained such bond on the 19th day of April, 1880, by which bond the owners of said claims, in consideration of the sum of \$500 to them in hand paid by Davis and Caldwell, agreed to convey to E. L. Davis and H. J. Caldwell said claims upon the payment of the sum of \$7,500 on or before July 22, 1880; that Davis and Caldwell each paid one-half of said sum of \$500; that Caldwell went east to sell said option immediately after said bond was secured, and returned to this state on the 11th day of

July, 1880, without having made a sale; that before Caldwell returned from the east, and some time in the fore part of June, he wrote to Davis that he had failed to make a sale and that he did not feel disposed to put the amount of the bonded price of the properties into them; that Davis, upon the receipt of this letter, commenced negotiations with Jacob Ohlwiler for a sale to him of an interest in the bonded property.

The following testimony of Jacob Ohlwiler clearly shows the nature of the transaction between Davis and Ohlwiler: "*Question.* When did you become interested in these claims? *Answer.* In 1880. *Q.* About what time? *A.* July 13. *Q.* How did you come to get interested, and how did you get interested in these claims? *A.* By purchase. *Q.* From whom? *A.* From E. L. Davis,—from the owners through E. L. Davis. *Q.* How were you induced — how did you come — to buy them or obtain an interest in them? *A.* By proposition from E. L. Davis. *Q.* When was that proposition first made to you? *A.* I couldn't tell the date, but I think some time in June,—the latter part of June. *Q.* What was the proposition that you should pay for the half? how much did he propose that you should pay for half? *A.* \$8,000. *Q.* Did he explain to you, or did you have any conversation with him, in regard to the condition in which the title to the property stood? *A.* Yes, sir; Caldwell and he (Davis) had a bond on it. *Q.* Did he state how much of a bond? *A.* No. *Q.* Did he state the bonded price? *A.* No, sir. *Q.* Did you know what the bonded price was? *A.* Not at that time. *Q.* State, Mr. Ohlwiler, what the substance of the conversation was you had at this time at Columbus or Telluride with Mr. Davis with reference to these mines,—these lodes. State the substance of the conversation you had. *A.* Well, I recollect he stated that he (Mr. Davis) and Mr. Caldwell had a bond on the mine, and if Mr. Caldwell did not make a sale they were for sale, and that I could buy a

half interest or more. That was about all that was said at that meeting; that was the substance. Q. How long after this conversation with Mr. Davis at Columbia—how long a period elapsed—before you made any preparation to purchase a half interest in this property? A. I don't fully recall the time. It was after some several weeks, though I don't know how many,—until several weeks after I talked with Davis upon the subject. Q. In the meantime, between the conversation at Columbia and the next conversation you had with Davis, you entered into a correspondence with another person with regard to this one-half interest? A. Yes, sir. Q. When did you next have a conversation with Davis with reference to this property? A. I stated, several weeks hence. Q. Where was it? A. At Ouray, I think. Q. Can you remember about the date, or near the date? A. I don't think I can. Q. Do you remember how long previous to your buying an interest in the property it was? A. No; I can't fix the date. Q. Well, then, days, weeks or months? A. It may have been two weeks before I made the purchase. Q. And what was the substance of this conversation? A. That I was to correspond with my friends in regard to it, and see whether I could raise the means to meet the payment. Q. Did you have any conversation with Davis at Ouray concerning the condition in which the property was, in which the title of the property stood, and how you were to receive one-half interest in the property for the \$8,000? A. I understood that Mr. Caldwell could not sell the property, and that I would look for a straight title from him, or I didn't want the property. Q. From whom? A. From Davis or any other person,—a straight title for half of the interest. Q. Did you have any conversation with Davis in regard to the manner in which you were to receive this straight title to one-half interest,—how Davis was to arrange the matter so as to give you a straight title? A. I think that was in the presence of Mr. Letcher.

Q. Will you state to the court what was the conversation? A. I think Mr. Letcher stated there was — [Defendants counsel objected to the witness giving Mr. Letcher's statements]. Q. Was Mr. Davis present? A. Mr. Davis was present. [And thereupon the court overruled the objection, and the witness answered.] A. That title may be had, that Mr. Letcher said the title may be had, through making purchase of Mr. Davis, or making purchase of Mr. Caldwell, or they sell a joint interest to me, or that the bond lapses the time, and then get it that way. I told them it didn't make any difference to me so I got a straight title. I don't care how they done it; how it was done. Q. While you were at Ouray, what understanding, if any, did you have with Davis as to your purchase of this property? A. That, if I could raise the money, I would take the property, if he could give me a good deed and title. Q. What understanding did you have with Davis as to what you should do with reference to raising the money? A. I was to go on to Lake City and telegraph to my friend for funds to pay this \$8,000. Q. Was there any understanding with reference to any correspondence? A. There may have been before that, — before I went to telegraph. Q. There may have been? Are you not certain whether there was or not? A. I think there was. Q. When did you buy one-half of this property, and how did you come to buy it? A. On the 13th day of July, 1880, by paying \$8,000, and receiving a deed from Nortons and Rutan. Q. How did you pay this \$8,000, and to whom? A. To Rutan and Nortons, two brothers, and Mr. Davis. Q. How much did you pay Mr. Davis? A. I think it was \$500. Q. On the 12th or 13th did you have any conversation with Mr. Davis in regard to this property? A. I think it was on the morning of the 13th I told him I was ready to buy the property. Q. What did he state? A. He said he was ready to sell it, — ready to give deed. Q. What did he state with reference to being able to give deed at that

time,— to give you a straight title to the property on the 13th? *A.* That he had purchased Caldwell's interest in the bond, and the transfer would be made direct from the parties owning the property. *Q.* At what price was the whole property bought from the owners? *A.* \$8,000. *Q.* How much of the \$8,000 did the owners receive from you? *A.* \$7,500. *Q.* *Is it not a fact that, previous to your going to Lake City, you had an understanding — there was an understanding had between yourself and E. L. Davis — that if Mr. Davis could succeed in buying the interest of Mr. Caldwell in this bond that you were to buy one-half of this property for \$8,000?* *A.* *I think there was."*

Upon cross-examination this witness was asked the following question: "*Q.* *I will ask you if Davis on his part, in communications with you prior to going to Lake City, did not state it as a condition that he should first become the sole owner of the bond; that he should buy the Caldwell interest on his part?* *A.* *I think there was such a conversation on his part."*

It is also shown by the evidence that Caldwell returned from the east on the 11th day of July, and on the 12th day of July assigned his interest in the bond to Davis for \$500 and a horse worth \$100; that Davis did not inform Caldwell, and Caldwell did not know, of the negotiations had between Davis and Ohlwiler, and that the assignment of Caldwell's interest in the bond was made by him in total ignorance of such negotiations. The allegation in defendant's answer, that the duty of selling said mining claims devolved solely on the plaintiff, is not established by the evidence.

Mr. T. J. O'DONNELL, for appellant.

Mr. J. F. VAILE, for appellee.

RISING, C. The numerous assignments of error will not be separately discussed; but, under a general consid-

eration of the case, the rulings of the court below, upon which the errors are assigned, will be passed upon.

The first and most important question for consideration is that of the sufficiency of the evidence to entitle the appellant to the relief demanded. Appellant bases his right of relief upon the conduct of the appellee; and how far the conduct of the appellee affects such right must be determined by the relations of the parties to each other. The plaintiff alleges that they were copartners for the purpose of buying and selling an option on certain mining claims. Under the decision in *Kayser v. Maugham*, 8 Colo. 232, the evidence in this case fully establishes the allegation. The relation existing between partners is one of trust and confidence. Pom. Eq. 963. Partners, when dealing with each other in relation to partnership matters, are required to make full disclosure of all material facts within their knowledge, in any way relating to the partnership affairs. A community of interest exists between the partners, and a community of interest produces a community of duty. This community of interest, by the terms of the bond and the agreement of the parties, was to continue until the 22d day of July. The bond having been obtained for the purpose of selling the option so acquired at a profit, for the joint benefit of appellant and appellee, a joint duty and obligation rested upon each, during the full time the bond had to run, to work for the accomplishment of such purpose. We think the evidence clearly shows that appellee did not perform this duty; that, prior to appellant's return from the east, appellee had negotiated a sale to Ohlwiler of one-half interest in the property for his own exclusive benefit; that he deliberately planned to obtain appellant's interest in the bond to enable him to carry out his negotiations with Ohlwiler; that he intentionally concealed from appellant all knowledge of his negotiations with Ohlwiler, and he led appellant to believe that he wanted appellant's interest in the bond for the sole purpose of

enabling him to put up the money and take the property.

In Story, Eq. § 329 α , it is said: "When the contract is between those who sustain, or have lately sustained, any intimate and confidential relation, the law presumes the existence of that superiority and influence on the one part, and that confidence and dependence on the other, which is the natural result of the relation, and will accordingly decree the cancellation of the contract, unless it appear affirmatively to have been equal and just." In the making of this contract the parties were not on equal footing. Davis had knowledge of facts relating to the sale of the property which Caldwell did not have, and which knowledge equity and fair dealing required of him to disclose to Caldwell, because such knowledge was obtained under circumstances which made it the common property of himself and Caldwell. The concealment of, or the failure to disclose, these facts to Caldwell made Davis guilty of an actual fraud. Pom. Eq. Jur. § 901; Story, Eq. Jur. § 308; *Dambmann v. Schulting*, 75 N. Y. 55, 61.

The contract between Davis and Caldwell was unequal in that it enabled Davis to obtain all the benefits under their joint undertaking, and unjust in that such benefits were so obtained by reason of the suppression by Davis of facts which it was his duty to disclose.

In *Fitzsimmons v. Joslin*, 21 Vt. 129, 138, Redfield, J., in commenting upon conduct of this nature says: "Can it be said, then, that when one party acts under a misconception of the facts most material to the contract, which are known to the other party and studiously kept back, knowing that the other side is acting under this delusion, can it be said that such contract is binding at the bar of conscience, or, indeed, in moral or legal justice? I trust not."

In making the sale to Davis Caldwell was acting under misconception of most material facts. He was led to be-

lieve that a joint sale for the joint benefit of himself and Davis could not be made at a time when the only impediment in the way of a complete sale for the joint benefit of the parties was the desire and intention of Davis to obtain the full benefits of such sale for himself alone. Davis was under a legal as well as a moral duty and obligation to place Caldwell in possession of all information he had obtained relating to the sale or probable sale of the bonded property, during the existence of the copartnership, before he attempted to contract with Caldwell for his interest; and because of his failure to perform this duty and obligation the contract should be canceled.

The evidence fails to disclose such laches on the part of plaintiff in the bringing of his suit as will defeat his right to relief.

The question of tender is met by the allegations of the complaint that plaintiff offers to pay to the defendant, his copartner, what, if anything, should be found due from plaintiff to defendant upon an accounting and settlement of the partnership affairs, and demanding that such accounting be had, and charging the fact to be that the defendant will be found to be his debtor on such accounting. If in fact the defendant is indebted to the plaintiff in a sum equal to the amount defendant paid for the assignment of plaintiff's interest, we see no reason why the court of equity should require a further tender to be made. *Watts v. White*, 13 Cal. 321.

The question of laches by the plaintiff in bringing his suit was made an issue by the pleadings, and the seventh, eighth, ninth and tenth assignments of error are based upon the rulings of the court in the rejection of the testimony offered by the plaintiff upon this issue. There was no exception to the ruling of the court upon which the eighth assignment is based. In view of our conclusions upon another branch of the case, it is not necessary to discuss these assignments. The question of laches must be determined upon the knowledge of the plaintiff,

and his diligence in obtaining knowledge of the facts upon which his right to relief rests. There was no such laches on his part as will defeat his right to relief.

The errors assigned upon the ruling of the court in rejecting testimony of the witness Letcher may all be considered together; the objection to each of the questions being based upon the proposition that the matter inquired about consisted of privileged communications by Davis, as client, to Letcher as his attorney. It appears from the evidence that Davis went to Letcher between the 7th and 10th days of July, 1880, with one of the Nortons and Mr. Rutan, at which time Letcher drew a release of warranty from Davis to the Nortons and Rutan, or to one of them, and that afterwards he drew a deed, and examined the title to the bonded property. Letcher further says that he presumes the deed he drew was the result of conversation had between Davis, Ohlwiler, Rutan and the Nortons at his office. To entitle a party to the protection accorded to privileged communications, the communications must have been made to the counsel, attorney or solicitor acting, for the time being, in the character of legal adviser, and must be made by the client for the purpose of professional advice or aid upon the subject of his rights and liabilities. 1 Greenl. Ev. §§ 239, 240. The evidence does not show that any communications had been made by Davis to Letcher, as his legal adviser, upon the subject of his rights and liabilities. The only employment of Letcher by Davis was to draw the release and deed. In drawing these instruments Letcher acted as a scrivener merely, bringing this case directly within the ruling in *Machette v. Wanless*, 2 Colo. 169, 179. In this case, as in *Machette v. Wanless*, the evidence does not show that Letcher was an attorney.

The witness was questioned as to the conversation between Davis and other persons in his presence, concerning matters not relating to his employment, and which were not communications made to him, and as to which

no confidence was reposed in him. The court erred in sustaining the objections made to the questions put to the witness Letcher, excepting the one upon which the fourteenth assignment is based.

The judgment should be reversed and the cause remanded in conformity with the views herein expressed.

We concur: MACON, C.; STALLCUP, C.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the district court is reversed and the cause remanded.

Reversed.

KENNEDY V. DENVER, SOUTH PARK & PACIFIC R'Y Co.

1. Plaintiff, being clearly guilty of contributory negligence, cannot recover for an injury received from a moving railroad train, unless wantonness or gross negligence on the part of employees operating the train be established.
2. Where plaintiff himself shows contributory negligence and fails to establish *prima facie* wantonness, judgment of nonsuit may be entered.

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Error to District Court, Jefferson County.

ON the 27th of January, 1883, plaintiff, George O. Kennedy, while walking in the day-time upon defendant's railroad track, was struck by the locomotive attached to a freight train and seriously injured. The train approached him from behind, and he knew nothing of its presence until struck. He was aware that his hearing was defective, but was not aware of the extent of such defect. In going upon the track at Dawson's switch station, he looked for trains, but made no inquiry concerning them. He had previously passed over the same track, and had always recognized without difficulty the presence of trains before they came in sight. The view was unobstructed for a distance of nine hundred feet back of the

spot where plaintiff was injured. Just prior to the accident the whistle blew six or seven times, quick, short blasts, winding up with a long, steady blow. Shortly afterwards the engine and caboose returned to the station, bringing plaintiff. The conductor went to one Rutherford, who lived near by, for aid, and remarked that he had caught that man; promising to send a physician that evening. The vacuum air-brake was in use on the train, and the train could have been stopped in a distance of from one hundred and twenty-five to one hundred and fifty feet. This action was brought to recover damages for the injuries thus inflicted.

At the trial the court below rejected the following evidence, offered to be proved by the plaintiff's son, and also, substantially, by one other witness: That he (the son) went to the conductor of the train the day of the injury, and told the conductor that his father, the plaintiff, had, five or ten minutes previously, started to walk along defendant's track to Dome Rock; also that his father was deaf, or partially so, and that he asked the conductor, on account of such deafness, to look out for him, and not run over him; that this was done in the presence and hearing of the two brakemen of said train and of one Rutherford; and that the conductor then and there replied that, if the plaintiff was deaf, he had no business on the track, and would get killed or run over. The witness was permitted to state that, after the conversation alluded to, the train started up, and the conductor went into the caboose. The following rules of the defendant company for its employees were received in evidence: "Rule 37. In cases where there is any room to doubt as to the safety of proceeding from any cause, adopt the safe course." "Rule 39. The conductor will have charge of the train, and of all persons employed on it, and is responsible for its movements while on the road, except when his directions conflict with these regulations, or involve any risk or hazard, in either of which

cases the engineer will be held alike accountable." At the conclusion of plaintiff's evidence defendant moved for a nonsuit, which the court allowed, and to review the final judgment entered thereon the present writ of error was sued out.

Messrs. A. H. DE FRANCE and S. E. BROWNE, for plaintiff in error.

Messrs. TELLER and ORAHOD, for defendant in error.

PER CURIAM. The rulings challenged by the first three assignments of error were correct, and the assignments will not be discussed.

Conceding that the testimony concerning notice to the conductor, and the latter's remark, should have been received in evidence, and that the court's action in excluding the same was error, we still think there is not sufficient ground for reversal. Plaintiff was a man of mature years, of sound mind and perfect eyesight. He was in the possession of unimpaired physical activity and strength. His only defect was that of being *partially* deaf. Of this defect he was aware, though perhaps he did not know its extent. Without inquiry about defendant's trains, he voluntarily went upon its track, and was walking thereon when the accident occurred. It was in the day-time, and the road-bed for nine hundred feet behind him was in full view. Prior to the accident the whistle was blown six or seven times in short, sharp blasts, excepting the last, which was a prolonged blast. Plaintiff's own evidence clearly establishes contributory negligence on his part. Therefore, under a well-known legal principle, before he could recover, it became necessary for him to show gross negligence or wantonness on the part of the employees operating the train. *Railroad Co. v. Holmes*, 5 Colo. 197; *Railroad Co. v. Cranmer*, 4 Colo. 524. Aside from the fact of the accident itself, and the testimony offered, but excluded, there is nothing in the

case to show that the injury was the result of such negligence or wantonness. We cannot presume that plaintiff would have offered other or further proofs had the rejected testimony been received; and, considering this testimony in connection with the other evidence, it does not appear but that the train was operated with the care required, under all the circumstances. Had the court admitted this testimony, we are of the opinion that a *prima facie* case of gross negligence or wantonness, requiring a submission to the jury, would not have been made.

The judgment is affirmed.

BECK, C. J. (*dissenting*). The plaintiff was guilty of negligence, but he was not as reckless as the court seems to suppose. He went upon defendant's railroad track at Dawson's switch to walk to Dome Rock, without making inquiries at the former point as to the time of the passage of trains. But the reason assigned for this is that he saw no one there to make inquiries of. There was no footway or path between the points mentioned, but wherever the ground alongside the railroad track was smooth enough, which was about one-fourth of the whole distance traveled by him, he would leave the track and walk by the side of it. Every time he went upon the track he looked for trains. He knew his hearing was defective, but he did not know the extent of that defect; having previously walked on the same track, and heard the approach of trains,—how recently he was not permitted to state. At this time, however, his hearing was so bad he did not hear the engineer's whistle, and the consequence was the engine struck and injured him. The foregoing items might be immaterial, in a legal point of view, if the officer in command of the train which run down the plaintiff had not been notified of his defective hearing. In this connection they are material. The complaint charges that the employees of the defendant in charge of the train well knew the plaintiff was walking

on the track in front of the train, going in the same direction, and that he was almost entirely deaf. Upon such a state of facts, I am of opinion that a greater degree of care was due from the men in charge of the train than if no notice of the situation and condition of the plaintiff had come to them. Without such knowledge the six or seven short, sharp blasts of the whistle, ending in a prolonged blast, may have been held to constitute ordinary care, but with this knowledge the engineer had good opportunity to prevent an accident had the same been communicated to him.

Very respectable authorities have held that walking on a railroad track is not negligence *per se*, and that, in case of injury ensuing, the question of negligence as to the act is one proper to go to the jury. *Hassenyer v. Railroad Co.* 48 Mich. 205; 12 N. W. Rep. 155; *Johnson v. Railway Co.* 56 Wis. 274; 14 N. W. Rep. 181; *Carter v. Railroad Co.* 19 S. C. 20; *Gothard v. Railroad Co.* 67 Ala. 114. If this be so in an ordinary case, where the party injured is in possession of all his faculties, the peculiar circumstances of this case, considered in connection with the knowledge possessed by the conductor of the train, would seem to warrant the same legal conclusion.

The trial having been to a jury, the plaintiff was entitled, under the law, to have produced in evidence all facts legally tending to show lack of ordinary care, recklessness, or wilful negligence on the part of the defendant's agents. The refusal of the trial court to admit testimony of this character, offered by the plaintiff, was error, and it is my opinion that the judgment of nonsuit was also error. Aside from abandonment of an action or consent of the plaintiff, the Civil Code permits a nonsuit, on motion of the defendant, only when the plaintiff fails to prove a sufficient case for the jury. Civil Code, p. 48, § 147. I do not say that the testimony introduced and offered made out a clear case for recovery in favor of the plaintiff. Whether he would have been entitled to a

judgment for damages is a close question; but my dissent is based on the proposition that the plaintiff was wrongfully deprived of legitimate testimony offered by him in the first place, and wrongfully deprived of the consideration and judgment of the jury upon his whole case, in the second place. Cases often arise, and this is an example of the class, in which there is room for difference of opinion as to the inferences and conclusions which may be drawn from the existing facts. In such cases it is the province of the jury, and not of the judge, to find the facts, to make the proper inferences, and to deduce the proper conclusions therefrom. This is to be done under instructions from the court as to the principles of law applicable to the case.

It is a general rule that contributory negligence on the part of the plaintiff will defeat an action for injuries caused by the negligence of the defendant; but it is a sound and well-established rule of law that contributory negligence is no bar to an action for a wilful injury. *Kenyon v. Railroad Co.* 5 Hun, 479; *Green v. Railway Co.* 11 Hun, 333, and cases cited. A technical trespass is held not to deprive the trespasser of his rights to recover damages for an injury which he suffers through the wilful negligence of another. Shear. & R. Neg. § 36; Thomp. Neg. § 1162; Whart. Neg. § 344 *et seq.*; *Isabel v. Railroad Co.* 60 Mo. 475; *Meeks v. Railroad Co.* 56 Cal. 519, and cases cited; *Railroad Co. v. Miller*, 25 Mich. 279; *Railroad Co. v. Neubeur*, 62 Md. 398. Says the author of Beach on Contributory Negligence, section 18: "When one, after discovering that I have carelessly exposed myself to an injury, neglects to use ordinary care to avoid hurting me, and inflicts the injury upon me as the result of his negligence, there is very little room for a claim that such conduct on his part is not wilful negligence." The foregoing principles of law appear to have been ignored in the trial of this case. One of the offers of proof made, and rejected by the

court, was as follows: "The plaintiff then offered to prove by the witness on the stand that on the 27th day of January, A. D. 1883, the day on which the alleged injury occurred, he went to the conductor of the train doing the injury, and told the conductor that his father, the plaintiff, had just started down the railroad track on which said train was then standing, to Dome Rock, about five or ten minutes before the time of his telling the conductor the same, to walk along the track to Dome Rock, the same being defendant's track; that he also told the conductor that his father, the plaintiff, was deaf, or partially so, and asked the conductor to look out for him and not run over him, because he was deaf; that this was done in the presence and hearing of the brakemen of said train and one Edward J. Rutherford, and that the conductor then and there replied 'that, if the plaintiff was deaf, he had no business on the track, and would get killed or run over.'" The testimony shows that the train causing the injury was a freight train, with a caboose attached to the rear end, and that the train was from one hundred and eighty to two hundred feet in length. On starting from Dawson's switch the conductor, without communicating with the engineer, it appears, took his seat in the rear car. The train had gone three thousand four hundred and twenty-six and four-tenths feet, or about five-eighths of a mile, when the engine struck and seriously injured the plaintiff. The indications are that no attention was paid to the notice given the conductor. There was a clear stretch of nine hundred feet in which he could be seen from the train before the engine struck him. The train could have been stopped by the application of the vacuum air-brakes in a distance of from one hundred and twenty-five to one hundred and fifty feet. The facts proved, and offered to be proved, therefore, constitute a chain of circumstances affording room for difference of opinion as to the inferences and conclusions which might be drawn there-

from. Some of the facts alleged in this case are the subject of inference from other facts and circumstances shown or offered to be proven; as, the inference concerning the failure of the conductor to take any precautions to prevent injuring the plaintiff. The question of negligence in such a case is not a question of law for the court, but it is the exclusive province of the jury to consider and weigh the testimony, to find the facts, make the proper inferences, and to draw the proper conclusions therefrom. 1 Phil. Ev. 599; *Nelson v. Railway Co.* 60 Wis. 323; 19 N. W. Rep. 52; *Ernst v. Railroad Co.* 35 N. Y. 38; *Railroad Co. v. Stout*, 17 Wall. 657. The facts concerning the notice given the conductor at Dawson's switch, his words and conduct, should have been admitted in evidence; and it should have been left to the jury to determine, under proper instructions from the court, whether the agents of the defendant exercised ordinary care, under the circumstances of this case, to avoid the catastrophe, or whether the injury to the plaintiff was the result of their wilful negligence.

It is held that an engineer who sees a man walking upon the track, and is not aware that he is deaf, or insensible of danger from any cause, has a right to presume that he will get off in time to escape injury. But this presumption does not exist in the case of a child of tender years, or of a person known to him to be deaf, or otherwise insensible of danger. His duty in the latter case is to take such precautions as are reasonably necessary to prevent disaster, even to stopping his train. Whart. Neg. § 389; *Railroad Co. v. Miller*, 25 Mich. 279. Even a drunken man is said not to be so far beyond the pale of the law that he may be injured with impunity. *O'Keefe v. Railroad Co.* 32 Iowa, 467; *Whalen v. Railway Co.* 60 Mo. 323. This court said, in *Railway Co. v. Ward*, 4 Colo. 30-34, "Notwithstanding the company's exclusive right of the use of its roadway, it is still bound to use ordinary care to avoid injury to persons who may

be upon or near its track. What is ordinary care is to be measured, not only by the dangerous forces put in motion, but by the special circumstances of time and place." In *Railway Co. v. Cranmer*, 4 Colo. 524, it was said: "The plaintiff, even though a trespasser on the track, may recover, if the defendant, with knowledge of his danger, failed to exercise ordinary care to prevent it;" citing the following paragraph from Shear. & R. Neg. § 36: "It is now well settled that a plaintiff may recover, notwithstanding his own negligence exposed him to risk of injury, if the defendant, after becoming aware of the plaintiff's danger, failed to use ordinary care to avoid injuring him." In *Behrens v. Railway Co.* 5 Colo. 400, it was held that a nonsuit was proper when it affirmatively appeared from the plaintiff's evidence that he was guilty of contributory negligence which was the proximate cause of the injury. That this ruling was not intended to excuse a case of wilful negligence is evident from the remark of the court, in commenting upon the case cited: "But the fact that the latter was a trespasser gave the railroad company no license to run its engine over him." In *Railroad Co. v. Martin*, 7 Colo. 592, we recognize the rule that where the conclusion from the evidence is fairly debatable, or rests in doubt, the question of negligence is always for the jury. To warrant the court in instructing the jury that a party is guilty of negligence, a case must be such as to allow no other inference from the evidence; and that, if a question depends upon a state of facts from which different minds may honestly draw different conclusions, the question must be submitted to the jury. That case also recognizes the rule that when the plaintiff so far contributes to the disaster by his own neglect, or want of ordinary care and caution, as that, but for such neglect or want of care and caution on his part, the misfortune would not have happened, he is not entitled to recover. This latter rule is not applicable in a case where the proximate cause of the

injury arises from the wilful neglect of the defendant, or the failure on his part to exercise ordinary care to avoid the accident; reference being had to the circumstances of the case.

Referring, now, to the circumstances of the case before us, the conductor was the officer in charge of the train. His reply to the son of the plaintiff, when informed by the latter that his deaf father had started down the track a few minutes in advance of the train, accompanied by the request not to run over him, considered in connection with his conduct in seating himself in the rear car, without communicating with the engineer, certainly indicated indifference to the fate of the plaintiff. His further remark, made a few minutes later, to the witness Rutherford, on returning with the plaintiff in his mangled condition, "that he had caught that man," was apparently quite as indifferent and heartless. In view of the conduct and speeches of this officer, and of the fact that the plaintiff was run down by his train when it could have been so quickly slowed up or stopped, the jury might have been warranted, in the absence of other and contrary evidence, in drawing the inference that he failed to take any precautions to avoid the disaster. Presumptions of fact are derived directly from the circumstances of the particular case by reasoning from the common experience of mankind; and this process of ascertaining one fact from the existence of another is said to fall exclusively within the province of the jury.

1 Greenl. Ev. §§ 33, 44, 48. The case being left to the jury, it might have rationally inferred from the circumstances mentioned that the injury done the plaintiff was the result of wilful negligence on the part of the defendant.

For the foregoing reasons I am of opinion that the judgment should be reversed and the cause remanded for a new trial.

Affirmed.

PARKISON V. BODDIKER.

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1. Under the statute, in an action on a promissory note the answer is required to be verified only when it challenges the *manner* of the *execution* of the instrument. If threats and duress be set up as a defense, such defense is within the statute and must be sworn to.
2. Where nothing appears in the record to the contrary, the regularity of all proceedings in courts of general jurisdiction must be presumed.

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12a 260*Appeal from County Court, Summit County.*

THE complaint of J. E. Parkison, plaintiff, alleges that the defendant, John C. Boddiker, made his promissory note to one Charles Merrill for the sum of \$100, dated October 13, 1883, payable three days after date, with interest at two per cent. per month until paid; that said Merrill on the 15th day of October, 1883, indorsed said note to the plaintiff. The amended answer of defendant sets up the following facts as a defense: That at the request of Breeze & Breeze, as attorneys for Charles Merrill, he went to their office in Breckenridge on the 13th day of October, 1883, at which time said attorneys claimed to him that he had misrepresented the sale of certain mining property, and had deceived the said Merrill as to the amount received for the same, and that, unless he would at once pay said Merrill the sum of \$100, or give his note for the payment thereof at three days, Merrill, or his said attorneys, would have him arrested and indicted on two criminal charges; that he was not allowed to see or procure counsel after the said threat was made, and that it was under the said duress that he signed said note; alleges that defendant received no value for said note; that long prior to the signing of said note there was a full and complete settlement by and between the said Merrill and defendant, in connection with the Raven mining claim, out of which this whole proceeding and transaction grew; that said note was not assigned for value to the plaintiff

before the maturity thereof. The replication of the plaintiff denies the alleged threats and duress; denies want of consideration; alleges that the note was assigned to plaintiff for a valuable consideration, and before maturity; and, as to any settlement between defendant and said Merrill, alleges that plaintiff knows nothing about it, and cannot answer, and that under the law he is not bound to answer or know anything about defendant's transactions with Merrill. None of the pleadings were verified.

Upon the trial defendant made the following offers of proof: *First*. "The fact that the said note sued upon was procured through and by fraud, and under duress, and without consideration." *Second*. "That there was collusion between Charles Merrill, the payee of the note sued upon, and J. E. Parkison, the indorsee or assignee, and plaintiff herein, to the effect that there was no value received or passed between them *bona fides*." *Third*. "That the indorsee or assignee and plaintiff herein had full knowledge of how said note was obtained and without consideration, and that he was not a *bona fide* purchaser for value, or otherwise, before the maturity thereof." *Fourth*. "That upon the cross-examination of Charles Merrill, the original payee of the note, the defendant offered to prove the fraudulent obtaining of said note, and that no consideration was paid or given therefor." To the offer and admission of such testimony the plaintiff objected, which objection the court sustained, and to which ruling defendant excepted.

Mr. L. C. NORTHRUP, for appellant.

Messrs. J. M. and L. M. BREEZE, for appellee.

RISING, C. The assignments of error based upon the ruling of the court in sustaining plaintiff's objection to the admission of proof offered by defendant present the only questions we are at liberty to consider, except the question raised by the eighth assignment, for the reason

that to no other ruling of the court upon which an assignment is based was an exception taken.

Upon the trial the defendant offered to prove that "the note sued upon was procured through and by fraud, and under duress, and without consideration." The court sustained plaintiff's objection to the admission of the evidence. Counsel for appellee, in their argument, base their objection to the admission of this evidence upon the provisions of section 11, chapter 9, General Statutes. We do not think that the objection can be sustained upon this ground. This section of the statute provides that, "if any fraud or circumvention be used in obtaining the making or executing of any of the instruments aforesaid, such fraud or circumvention may be pleaded in bar to any action to be brought on any such instrument so obtained, whether such action be brought by the party committing such fraud or circumvention, or any assignee of such instrument, unless such instrument was negotiated before due." This statute is identical with the Illinois statute on the same subject, except that the clause, "unless such instrument was negotiated before due," is not found in the Illinois statute. This clause renders the statute inoperative to effect the purpose for which the Illinois statute was enacted. At common law the defense of fraud in procuring the execution of a note would not defeat an action by an innocent indorsee before maturity, and the Illinois statute was enacted to permit such defense to be made against an indorsee before maturity in cases where such indorsee was a holder for value, and without notice of the fraud. *Taylor v. Atchison*, 54 Ill. 196; *Hubbard v. Rankin*, 71 Ill. 129. In our statute this clause makes an exception to the application of the general provisions of the statute, and this exception takes away the whole force of the statute, so far as it attempts to change the common-law rule in such cases. The statute in no way affects the rules of pleading, but goes to the right to interpose a defense, and the

application of the statute is to be made to the facts of the case as found from the evidence. If the answer set up a defense, and the evidence offered was pertinent to prove it, it should have been admitted.

The amended answer alleges that the note sued upon was executed under duress; that defendant did not receive value for the same; that the note was not assigned for value to the plaintiff before maturity; that long before the execution of said note there was a full and complete settlement by and between the payee of said note and defendant, in connection with the Raven mining claim, out of which this transaction grew. The complaint contained a copy of the note. The answer not being verified, the question arises as to how it is affected by the provisions of section 66 of the code, which provides that "when an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified." In determining what issues, if any, are raised by the answer, the admissions made by reason of the failure to verify it must be considered. By the express provisions of the statute, the genuineness *and* due execution of the note are admitted. Code, § 66; *Watson v. Lemen*, 9 Colo. 200.

The first question presented in the consideration of this statute, in its application to this case, is the force and effect to be given to the word "genuineness." Prior to the code provision it was provided by statute that "no person shall be permitted to deny, on trial, the execution of any instrument in writing, whether sealed or not, upon which any action may have been brought, * * * unless the person so denying the same shall, if defendant, verify his plea by affidavit." This statute was repealed by the code. The provisions of the Revised Statutes and the provisions of the code are upon the

same subject, and the fact that the wording is different is an intimation that they are to have a *different* and not the *same* construction. *Rich v. Keyser*, 54 Pa. St. 86-89. From an examination of this statute it seems to us apparent that the only reason for placing the word "genuineness" in the code provision was to extend the application of the statute to a class of cases not included within the old statute; that it should cover more ground than the old one did. For the purposes of this case it is not necessary to determine to what extent the application of the new statute to cases not within the provisions of the former statute was enlarged. The fact that the new statute has an enlarged application must, in case there is a conflict in the decisions of the courts upon the construction of similar statutes, lead us to accept the construction giving to the statute the most extended application, if such construction is not clearly beyond the meaning of the statute.

It is not necessary to review the decisions which give to the statute the most limited application, but a review of the decisions which give the statute a more enlarged application may assist us in arriving at a correct conclusion in our application of the statute to this case; and such review will, as we think, show conclusively that the statute is not restricted in its application to a denial which goes only to the proper form of the execution of the instrument, and to its genuineness, as the same may appear to be genuine or otherwise upon the face of such instrument. In *Hunt v. Weir*, 29 Ill. 83, in an action of *assumpsit* upon a promissory note, the defendants pleaded the general issue, and gave notice that they would prove facts tending to show the non-delivery of the note by them. Held, that the notice went to the execution of the note, and that the evidence of the facts could not be given without plea verified. This decision makes a delivery an essential part of the execution, and this is the question decided; but the opinion seems to go further,

and indicate that the denial should go to something more than a denial of the signatures and delivery. Breese, J., speaking of the notice attached to the plea, says that by it "they call in question the execution of the note, as a note binding on them, and, as strong as language can do it, deny its execution as *their* note." In *Dewey v. Wariner*, 71 Ill. 198, in an action upon a bill of exchange, the only plea filed by the defendant was the general issue, not sworn to, with notice in writing of special matters relied upon as a defense. Upon the trial the court refused instructions based upon the hypothesis that there was evidence before the jury that the draft had been altered, and hence was not the draft of defendant, and that an issue of that character had been formed and was for trial by the jury. The court, following *Hunt v. Weir*, *supra*, say: "Had the defendant desired to present to the jury the question of the alteration of the draft by evidence and instructions, he should have filed the proper plea sworn to. That issue did not and could not arise on a plea of general issue, with notice of special matters in writing." In that case the special matter in the notice, relied on as a defense, consisted of facts which would show that the draft was not binding on the defendant; that it was not his genuine draft; not that he did not sign and deliver it, but that it was of no validity as against him. In *McWhorter v. Lewis*, 4 Ala. 198, under a special plea, the defendant offered to prove that a note signed "Alvin A. McWhorter, President W. & Coosa R. R. Company," was given by him to the plaintiff, and by the plaintiff accepted as the note of the company. Held, that the plea setting up the facts attempted to be proved must be verified in order to render the proof admissible. Upon the face of this note it was the note of the defendant. It was signed by him and delivered by him. The plea raised the question that the note was not his genuine note, because it was not taken or accepted by the plaintiff as the note of defendant, but as the note of

the company. In *Bryan v. Wilson*, 27 Ala. 208-215, it was held that "pleas which amount to nothing more than a denial of an execution of the note sued on, *in such a manner as to be binding on the defendant*, are bad unless they are verified by the affidavit required by the statute." This decision was not based upon the form or manner of execution. In *Fowler v. Bender*, 18 Ark. 262, it was held that a special plea of *non est factum* must be verified by the affidavit of the party pleading. In *Archer v. Ward*, 9 Grat. 622-631, it was held that the genuineness of a note depended, "not only upon its due execution, but also upon its having remained unaltered (in any material particular, at least) after its execution." This was held in the construction of a statute providing that, in an action upon the indorsement of a promissory note, such indorsement, with the name thereto subscribed, shall be deemed and taken to be genuine, and the name to have been subscribed by the person charged therewith, without proof of the handwriting, unless the defendant shall file with his plea an affidavit that the said indorsement was not made by the person charged therewith.

In this state, in the case of *City of Central v. Brown*, 2 Colo. 703, an action was brought upon certain warrants issued to the plaintiff by persons acting as mayor and clerk of the city. The execution of the warrants was denied by plea verified by affidavits. Held, that the plea was sufficient to put in issue, not only the signatures of the officers, but their authority to issue such paper on behalf of the city. In *City of Central v. Wilcoxon*, 3 Colo. 566-569, the holding in *City of Central v. Brown* was approved and followed; the court, in commenting upon the statute requiring a verified plea, saying: "In terms it requires a defendant, if he would deny the execution of the instrument, to file a verified plea for that purpose. Such plea would be a demand that the plaintiff should prove, not only the *signatures* of the officers who issued the warrants in behalf of the city, but also that they had au-

thority to issue them." We think these cases show that it has been recognized in this state that the old statute covered something more than the mere formal execution of the instrument. It seems to us that the cases reviewed all point to the same construction of the statute as that given by the court in *Bryan v. Wilson, supra*, and that it is clear, upon principle and authority, that a defense which amounts to nothing more than a denial of the execution of the instrument sued on, *in such a manner as to be binding on the defendants*, must be verified, to authorize the admission of evidence to support it.

Our code provision is almost a literal copy of the California code provision, and this statute was construed in *Horn v. Water Co.* 13 Cal. 62-69, where it was held that a general denial without verification admitted the genuineness and due execution of the note sued on. In *Sloan v. Diggins*, 49 Cal. 38-40, in construing this statute it was said: "An instrument is genuine which is in fact what it purports to be." This seems to be a self-evident proposition. The note in suit purports on its face to be a valid obligation on the part of the defendant for the payment of the sum therein named. To question that it is a binding obligation on the defendant is to question its genuineness; if it was not executed in such a manner as to be binding on the defendant, it is not his genuine note. If the note was signed by the defendant under such duress as is alleged in the answer herein, as between him and the payee it has no more validity than a note with his name forged to it. In Daniel, Neg. Inst. § 857, the learned author says: "Any contract entered into under duress lacks the first essential of validity,—the consent of the contractor,—and bills and notes form no exception to the rule. In 1 Pars. Cont. 392, the same principle is stated.

The duress here spoken of is such duress as renders the contract executed under it of no binding force on the party subjected to it; and, if he is not bound by the terms of the instrument so executed, it is not a genuine instru-

ment as to him. The duress set up in the answer as a defense in this case was such duress as would render a note executed under it of no binding force in a suit thereon by the payee against the maker, and the defense of such duress directly questioned the genuineness of the note, and, not being verified, the court properly rejected proof offered in support of it. The answer setting up duress of the defendant as a defense in this case should have been verified to authorize the introduction of evidence in support of it, for the further reason that this defense, as set up, amounted to a denial of the execution and delivery of the note. The delivery of the note was not the voluntary act of the defendant. He was coerced by threats, and, in the hands of the payee, such a note has no more validity than one obtained against the will of the maker by physical force. It is not necessary for the defendant to deny that he placed the note in the possession of the payee in order to deny that he delivered it to him. In *Anderson v. Walter*, 34 Mich. 113, 115, Marston, J., in the opinion, says: "A defendant cannot be required to swear that the signature appearing upon an instrument is not his genuine signature in order to deny the execution. The signature may be genuine and yet the instrument a forgery." Applying the doctrine here announced to the case under consideration, it shows beyond question that the defense of duress set up in the answer was a denial of the execution and delivery of the note.

The construction we have given to this statute is the only one that can be given to it and give to all the words therein their usual and ordinary meaning. This construction works no hardship to any party. No party should be permitted to lightly question the verity of an instrument to which the party to be charged has affixed his signature; and to require the party making the defense that such instrument is not binding on him to

verify it with his affidavit is not unreasonable. It is proper to require the verification of such a defense, to advise the plaintiff that it is made in good faith, that he may prepare to meet it, and that the plaintiff may not be required to prepare to meet such defense when the party making it will not on his oath say that it is true.

It will be observed that we hold the statute to require verification only when the plea challenges the *manner* of the *execution* of the instrument. If the signature was forged, if the instrument was never delivered, or if the signature and delivery were compelled, against defendant's objection, by threats and duress, the defense is within the statute and must be sworn to. Not so with the defenses of fraud, want of consideration and kindred defenses, connected with the inducement acting upon defendant's mind in *voluntarily* executing the instrument, even though thereby the instrument might be rendered of no binding force as between him and the original payee. The statute under consideration is a part of the chapter on pleading. It prescribes a rule of pleading, and perhaps of evidence also, in plaintiff's interest. The effect of the statute is not only to obviate the necessity of making formal proof of the execution of written instruments as formerly practiced at common law, but to prevent the defendant from relying upon and supporting by proof certain affirmative defenses, unless the same be sworn to.

The allegations of want of consideration and settlement, in the amended answer, must be considered together. The allegation relating to the settlement may be considered as a statement of facts to be relied on to sustain the allegation of no consideration. This statement of facts shows that the presumed consideration grew out of dealings between the defendant and the payee of the note, in connection with the Raven mining claim. It follows, therefore, that the question of want of consid-

eration is wholly dependent upon the allegation of settlement, and this allegation is insufficient to raise the question of want of consideration, in that it does not appear from such allegation but that upon such settlement it was found that defendant was indebted to the payee of the note in a sum equal to the amount of the note in question, and that such indebtedness was due and owing at the time the note was given. The allegation is also defective for the further reason that it fails to aver knowledge by the assignee of the alleged want of consideration.

The allegation that the note was not assigned to plaintiff for value before maturity admits the transfer; and, if unconnected with the defense of duress and want of consideration, the allegation that the transfer was without value is immaterial. This allegation is also fatally defective under the well-known rule of pleading relating to negatives pregnant.

From this examination of the amended answer we come to the conclusion that no issue was raised by it, and therefore that the rejection of proof to support the allegations contained therein was not error. It is unnecessary for us, in the determination of the questions raised upon this appeal, to consider the question whether or not the rights of an innocent holder for value of negotiable paper would be affected by duress of the maker of the character charged in the answer, and upon that question no opinion is expressed.

The eighth assignment of error, "that the court erred in not polling the jury upon the verdict," is not well taken. There is nothing in the record proper showing that the jury were not called when they were brought into court by the officer having them in charge. There is a presumption in favor of the regularity of all proceedings in courts of general and ordinary jurisdiction; and, nothing appearing in the record to the contrary, it must

be presumed that the officer in charge of the jury did his duty.

The judgment should be affirmed.

We concur: STALLCUP, C.; MACON, C.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the county court is affirmed.

ELBERT, J. (*dissenting*). I cannot agree to the approval of the opinion of Mr. Commissioner RISING in this case. I dissent from the proposition that an answer of duress, to be available, must be sworn to.

The question of the verification of pleadings, *as such*, is dealt with in a preceding paragraph of the section construed, and it is there provided generally that when the complaint is verified the answer must also be verified. Beyond this the code lays down no rule respecting the verification of pleadings as such. In practice, proof of the due execution of contracts sued upon was often attended with difficulty, and upon the trial of a cause imposed upon litigants a hardship. Hence the enactment in most of the states of statutes similar to our own, providing that the due execution of contracts sued upon, if not denied under oath, should be *deemed admitted*. They prescribe a rule of pleading, but their object is to regulate the practice *as to a matter of evidence*. An answer of duress confesses and avoids; and that it does not come within the reason of the statute is plain, for, whether sworn to or not, *it admits in full* exactly what the statute says shall be *deemed admitted*. It admits the actual signing and delivering of the contract sued upon. It admits also the genuineness of the instrument; that is to say, that it is the *very instrument* which was signed and delivered. No burden of proof is laid, as in other cases under the statute, on the shoulders of the plaintiff, unless

the plaintiff is to be held to prove a negative, and this is not claimed in the opinion of the commissioner.

Again, it is plain from the language of the statute that it contemplates an answer which traverses. An answer which confesses and avoids is, *ex vi termini*, without the statute; it denies nothing, but alleges, affirmatively, new matter in avoidance. The answer which the statute provides for is practically the common-law plea of *non est factum*, allowed to be interposed to instruments sued upon, whether under seal or not. This plea, at common law, operated as a denial of the execution of the instrument *in point of fact only*. Chit. Pl. 511; Gould, Pl. 300, 301. I see no reason for saying that it presents any *other* or *broader* issue under the statute because verified, or because extended to instruments not under seal. The effect, however, of the commissioner's opinion is to say that the verified answer provided for by the statute does present a *broader* issue than that presented by the plea of *non est factum* at common law; that such an answer puts in issue not only the *formal* execution and delivery of the instrument sued upon, but also its *voluntary* execution and delivery. If this be true, then it logically and inevitably follows that the defense of duress need not be pleaded specially, but may be shown under a verified answer, which, without more, denies in the language of the statute "the genuineness and due execution" of the instrument upon which judgment is sought to be obtained. At common law the defense of duress could not be given under the general issue, *non est factum*, because such a defense was inconsistent with the issue. In such case it was the defendant's *act*, notwithstanding it was not his *voluntary act*. Hence it was necessary to plead the defense of duress specially. Gould, Pl. 300, 301. Under our statute, as construed by the commissioner, this objection no longer obtains. The defense of duress is not only entirely consistent with the issue made by the verified answer, denying the genuineness and due execu-

tion of the instrument, but is part and parcel of the issue so made, and can be shown under it. The corollary is as new as the parent proposition. Another result is that the defense of duress in our practice stands solitary and alone as the one and only affirmative defense, which, to be made available, must be sworn to. The object of interpretation is to arrive at the truth. In this case, by an ingenious and more or less plausible process of reasoning, a legislative intention has been discovered which I think in fact had no existence. I think the court below erred in refusing to allow the defendant to prove the duress alleged in his answer, and that the judgment should be reversed.

Affirmed.

DECEMBER TERM, 1887.

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CRAIG V. THOMPSON ET AL.

1. Under Revised Statutes of United States, section 2334, providing that the record of a mining claim shall contain a description of the claim located by reference to some natural object or permanent monument, a certificate giving the courses of two mountain peaks, in degrees and minutes, from the discovery shaft, was *prima facie* sufficient, and properly admitted in evidence.
2. In a suit to establish an adverse mining location, the court, of its own motion, instructed the jury concerning the statutory requirements relating to depths of discovery shafts or open cuts, and length of *adits*. *Held*, that as the jury were properly instructed, and their verdict was supported by the evidence, the rejection of instructions offered on the same points was not error.
3. Where one has long since abandoned any rights he may have had in a mining claim, and was not a party asserting any rights in the action, nor was any one authorized to represent him, instructions asked by defendant as to his rights were properly rejected.
4. Where one had made a location of a mining claim, valid in other respects, but had failed to file for record a valid certificate, an amended certificate, made before defendant had acquired intervening rights, would, as to him, relate back to and preserve the claim as originally located and staked.

Appeal from District Court, Chaffee County.

THIS was an action brought by George M. Thompson, George Parry and Daniel C. Sindlinger in support of an adverse claim to the ground in controversy, under the name of the "Bristol Lode," against J. R. Craig, who claimed the same under the name of the "Mammoth Lode." From the evidence it appears that Parry discovered the Bristol lode on the 4th day of August, 1880, then put up at the point of discovery a stake marked: "Bristol Mine. I locate this claim August 4, 1880, and claim one thousand three hundred feet north, and two hundred feet south. G. W. Parry & Company." On September 4, 1880, defendant Craig made his discovery of the

Mammoth lode, and put up a stake marked: "The Mammoth lode, discovered September 4, 1880. I, the undersigned, claim, by right of discovery, five hundred and fifty feet south and nine hundred and fifty feet north." On the 6th day of September, 1880, Craig met Parry somewhere (not on the premises), and, while together, Parry remarked, "I must go up and do my work on the Bristol mine up there;" when Craig said to him, "I have got a stake pretty close to your ground, and I would like to get enough ground to work it," and spoke of buying some ground from Parry. Parry deferred until they would go up and see; so they started up the mountain to see. On the way met Thompson and Sindlinger. Craig requested them to go along to see Parry's stake, so all went together. When approaching the claims, Craig's stake was seen by Parry, whereupon Parry charged Craig with being on his claim. Craig disputed, and said Parry did not have a legal stake. Parry charged him with trying to jump his claim. From thenceforward the parties remained at difference concerning the claims. About the 9th of September, 1880, Thompson and Sindlinger completed with Parry the purchase of an interest in the Bristol, and appellees then proceeded to do the discovery work upon the Bristol, so that towards the end of the month they had done several days' work thereon, and what they considered and regarded sufficient discovery work. It appears from the evidence that, at the time of discovery and putting up of the stake on the Bristol, Parry contemplated investing an interest in the claim in a man by the name of Runkle, and says that is why he put the word "company" after his name on the stake; but that as Runkle afterwards sent for his tools, saying he could not do anything more, he was dropped out. About September 9th or 10th, Sindlinger saw Craig going up towards the claims with stakes, whereupon he notified Craig that he had an interest in the Bristol, and that Craig should not go onto it. Craig disputed the legality

of Parry's claim. After finishing the discovery work upon the Bristol in September, 1880, the appellees surveyed the claim with fish-line and compass, following the vein north and south, and staked the claim according to law, made a location certificate, and had it recorded November 4, 1880; did the assessment work upon the Bristol for the year 1881, and with surveyor surveyed the Bristol, December 20, 1881, having the original location certificate as a guide to the same; made an amended certificate and recorded it January 12, 1882. The amended certificate described the same ground that was described by the original certificate, but referred to natural objects to identify the claim, in which respect the original certificate was defective. But these certificates were admitted in evidence, but afterwards the court excluded the original for the reason of the defect aforesaid. The original certificate is as follows:

"STATE OF COLORADO, *County of Chaffee* — ss. Know all men by these presents that G. W. Parry, D. C. Sindlinger and G. M. Thompson, the undersigned, have this 4th day of August, 1880, located and claimed, and by these presents do locate and claim, by right of discovery and location, in compliance with the mining acts of congress, approved May 10, 1872, and by subsequent acts, and with local customs and laws and regulations, one thousand five hundred linear feet and horizontal measurement on the Bristol lode, vein, ledge or deposit, along the vein thereof, with all its dips, angles and variations, as allowed by law, together with one hundred and fifty feet on the west side, and one hundred and fifty feet on the east side, of the middle of said vein at the surface, so far as can be determined from present developments, and all veins, lodes, ledges or deposits and surface ground within the line of said claim, one thousand three hundred feet running north from center of discovery shaft, and two hundred feet running south from center of discovery shaft; said discovery shaft being situate

upon said lode, vein, ledge or deposit, and within the lines of said-claim, in La Plata mining district, county of Chaffee, state of Colorado, described by metes and bounds as follows, to wit: Beginning at corner No. 1, running north one thousand five hundred feet to corner No. 2; from thence three hundred feet west to corner No. 3; thence one thousand five hundred feet south to corner No. 4; and from thence three hundred feet to corner No. 1. The above-named claim is located on Mount Hope; the said Mount Hope being situated on Clear creek, in La Plata mining district, county of Chaffee, and state of Colorado. Said claim is situated above timber line, and the stakes of corners Nos. 1 and 4 are located in what is known as 'Hewitt's Basin.' Said lode was discovered on the 4th day of August, A. D. 1880.

[Signed]

"G. W. PARRY.

"D. C. SINDLINGER.

"GEO. M. THOMPSON.

"Recorded November 4, 1880, 6:30 o'clock P. M."

Following is a copy of the amended location certificate of the Bristol lode:

"STATE OF COLORADO, *County of Chaffee*—ss. Know all men by these presents that we, G. W. Parry, D. C. Sindlinger and G. M. Thompson, the undersigned, have this 20th day of December, 1881, relocated and claimed, and by these presents do relocate and claim, by right of discovery and location, in compliance with the mining acts of congress, approved May 10, 1872, and by subsequent acts, and with local customs, laws and regulations, one thousand five hundred linear feet and horizontal measurement on the Bristol lode, vein, ledge or deposit, along the vein thereof, with all its dips and angles and variations, as allowed by law, together with one hundred and fifty feet on the east side, and one hundred and fifty feet on the west side, of the middle of said vein at the surface, so far as can be determined from present development, and all veins, lodes, ledges or deposits and sur-

face grounds within the lines of said claim, one thousand three hundred feet running north from center of discovery shaft, and two hundred feet running south from center of discovery shaft; said discovery shaft being situate upon said lode, vein, ledge or deposit, and within the lines of said claim, in La Plata mining district, county of Chaffee, and state of Colorado, described by metes and bounds as follows, to wit: Beginning at corner No. 1; thence north $14^{\circ} 26'$ east, seven hundred and fifty feet, to center side stake, and one thousand five hundred feet to corner No. 2; thence north $75^{\circ} 34'$ west, three hundred feet, to corner No. 3; thence south, $14^{\circ} 21'$ west, seven hundred and fifty feet, to side center stake, and one thousand five hundred feet to corner No. 4; thence south, $75^{\circ} 34'$ east, three hundred feet, to corner No. 1, the place of beginning, as originally staked on the surface variations, $14^{\circ} 28'$ east,—being the same lode originally located on the 18th day of October, A. D. 1880, in Book No. 13, page 381, in the office of the recorder of said Chaffee county. From the discovery shaft of said lode, an unknown mountain peak on the east side of Mission gulch, on Clear creek, bears south, $49^{\circ} 34'$ east, and mountain peak at head of Lake Fork of Clear creek bears south, $12^{\circ} 14'$ east. This further certificate of location being made without waiver of any previous rights, but to correct any error in prior location or record, and to secure all the benefits of section 1823 of the General Laws of Colorado.

“Date of relocation, December 20, 1881.

“Date of certificate, January 9, 1882.

[Signed] “G. W. PARRY. [SEAL.]

“D. C. SINDLINGER. [SEAL.]

“G. M. THOMPSON. [SEAL.]

“Filed January 12, 1882.”

Craig worked his claim, staked it, surveyed and located it; his original location certificate being defective, and excluded as evidence. In the month of September, 1881,

he made an amended certificate, including therein that portion of the Bristol in controversy here, being the same portion as he had before included within his stakes, and in his original location certificate, and recorded such amended certificate two days thereafter, viz., September 19, 1881, and had \$500 worth of work done on the Mammoth when he made application for his patent. This amended certificate of the Mammoth was admitted in evidence.

The court instructed the jury, on its own motion, as follows: “(1) That to perfect a valid location of a mining claim, under the law, the locator must first discover a vein, ledge or deposit of rock in place, carrying gold, silver, lead or other valuable deposit. He must post, at the point of discovery on the surface, a plain sign or notice, containing the name of the lode, the name of the locator and date of discovery. He must also, within sixty days from the date of discovery, sink a discovery shaft to the depth of at least ten feet from the lowest part of the rim thereof at the surface, or deeper, if necessary to discover the vein thereof. Within three months from the date of discovery, and before the filing of the location certificate hereinafter referred to, he must erect six substantial posts, hewed on the sides in towards the claim, to wit, one at each corner, and one at the center of each side line thereof, and, within three months of the date of discovery, he must further file with the clerk and recorder of the county in which the claim is located a location certificate, containing the name of the lode, the name of the locator, the date of location, the number of feet claimed on each side of the center of the discovery shaft, the general course of the lode, as near as may be, and such a general description as shall identify the claim with reasonable certainty; provided, that if such location certificate is not filed within three months from the date of discovery, but is so filed afterwards, and before third parties have acquired rights in the prem-

ises, it is sufficient compliance with this requirement of the law. An open cut or tunnel, which shall cut the lode at the depth of ten feet perpendicularly below the surface, or an adit of at least ten (10) feet in along the vein from the point at which the same is discovered, shall hold the lode the same as though a discovery shaft had been sunk as aforesaid. (2) If you find from the evidence that plaintiffs, during 1880, made a location of the premises in dispute by a full compliance with the law, as stated in the foregoing instruction, and that, during the year 1881, they placed thereon \$100 worth of work or improvements or both, then you will find a verdict for the plaintiffs; provided you further find from the evidence that the date of their discovery preceded the discovery of defendant. (3) But, on the contrary, if you find from the evidence that plaintiffs failed to make a valid location of the premises in dispute, and that defendant has made the same by a full compliance with the law, as aforesaid, and, during the year 1881, defendant has performed the annual assessment work by the expenditure thereon of \$100, as aforesaid, then you will find for defendant. (4) If you find from the evidence that plaintiffs were prevented from performing the annual assessment work of 1881 by defendant, his agents or employees, by force or violence, or by threats or intimidation, then, in law, plaintiffs are in the same position as though the same had been performed, and you should find that such assessment work had been done and performed. (5) If you believe from the evidence that the defendant discovered, located and recorded the Mammoth lode according to the requirement of law, as stated in other instructions, prior to the filing of plaintiffs' amended location certificate, January 12, 1882, you cannot consider such amended certificate of location of the Bristol lode for any purpose whatever, and must entirely discard the same in making up your verdict. (6) If you believe from the evidence that neither party has made a valid location of the premises in dis-

pute, under the law; or if you find that both parties failed to perform the work, or make their improvements thereon, required annually for the year 1881,—you will find your verdict that neither party is entitled to the possession of the premises.” And refused other instructions asked on the part of defendant Craig, which will be referred to hereafter.

The verdict of the jury was for the plaintiffs for the ground in controversy. Defendant Craig moved for a new trial for the following reasons: “(1) That the court erred in admitting plaintiffs’ amended location certificate in evidence; (2) that the court erred in refusing to admit the original location certificate offered by defendant in evidence; (3) that the court erred in refusing to allow the defendant to show that from the discovery shaft of the Bristol lode there were several known mountains and peaks in view, also a government monument, to which the said Bristol lode could have been tied; (4) that the court erred in refusing to give the instructions numbered as follows, asked for by defendant: 1, 2, 3, 4, 5 and 6; (5) that the court erred in giving instructions 1, 2, 3, 4, 5 and 6 [being the instructions given on the court’s own motion]; (6) that the verdict is contrary to the law and evidence.” Motion denied. Judgment rendered on verdict. Defendant reserved exceptions, and brings the case here on appeal. The errors assigned go to the admission in evidence of the amended location certificate of the Bristol lode, the charge made by the court, and the refusal to charge as requested, and to the verdict, that it was contrary to the law and the evidence.

Messrs. G. B. REED and P. C. ELLSWORTH, for appellant.

Messrs. HARTENSTEIN and SINDLINGER, for appellees.

STALLCUP, C. The questions assigned and argued here will be considered in the order presented.

1. Did the court err in admitting in evidence the amended location certificate of the Bristol lode? Upon the part of the appellant Craig it is insisted that this certificate of location was insufficient, for the reason that it did not refer to any permanent monument, as required by section 2324, Revised Statutes of United States, and that the rights of Craig had intervened. The requirement of this section is that the record of a mining claim shall contain "such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim." The amended location certificate locates the Bristol lode by reference to two mountain peaks,—one on the east side of Mission gulch on Clear creek; the other, at the head of Lake Fork of Clear creek,—by giving the course or bearing of each from the discovery shaft in degrees and minutes. *Prima facie* this was sufficient, taken in connection with the balance of the description to identify the claim, and the amended location certificate was properly admitted in evidence. If other mountain peaks exist in the same vicinity, visible from the same point, or if, for any other reason, neither one of those mentioned in fact served to identify this claim, that was matter for the appellant to show by proper proofs.

2. Did the court err in refusing to give the first and third instructions asked for by appellant? They were as follows: "The court instructs you that, when a discovery is made by an open cut, such open cut must cut the lode at a depth of ten (10) feet, and such cut, to be a lawful discovery, must be ten feet deep below the natural surface; and if you find, from the evidence, that the discovery cut on the Bristol lode was not excavated to the depth of ten feet at any point below the natural surface, you must find that it was not a legal discovery. You are further instructed that a party cannot, in running an open cut for discovery, avail himself of any natural elevation and exposure of the vein above the natural surface, in esti-

inating the depth of such excavation; that the law contemplates depth which cannot be obtained by picking up the face of a cliff." "If you believe, from the evidence, that the so-called Bristol lode was discovered by an open cut or drift on the vein, then, in order to make a valid discovery, plaintiffs must have cut, by their work in such discovery, ten (10) feet below the surface." If the discovery cut of the Bristol lode was *in along the vein*,—and we think the testimony shows such to have been the fact,—then the foregoing instructions prayed for by the appellant do not conform to the requirements of the statute as construed by this court. In *Mining & D. Co. v. Van Auken*, 9 Colo. 207, it was held that the legislature had applied the term "adit" to an excavation "in and along a lode," and had fixed, as the initial point from which the development was to be measured, "the point where the lode may be in any manner discovered." The distance required for an adit to be run in, upon or along a lode is ten feet, without regard to depth. The testimony in the present case shows an excavation of the vein for a distance of about fourteen feet. The court instructed the jury, on its own motion, concerning the statutory requirements relating to depth of discovery shafts or open cuts, and the length of adits. The jury having been properly instructed, and its finding being supported by the evidence, there was no error in the rejection of the instructions mentioned.

3. Did the court err in refusing to give the following instructions for appellant: "The mining law of this state allows a person to locate a mining claim for himself and others, with his name and that of others on the location, and designating of the claim; and when one person thus locates a lode or claim for himself and those others, even though the others have no knowledge of the location, the persons who have no knowledge of the location of the same become tenants in common with the locator, and cannot be divested of their interests by the locator

afterwards tearing down the notice, and posting up another omitting their names, unless this is done with their knowledge and consent. And if you find, from the evidence, that a man by the name of Runkle was interested with Parry in said location or discovery, and, without his knowledge or consent, the stake was so changed that D. C. Sindlinger and George Thompson were to acquire any interest by virtue of such discovery, then you will find that such last staking was void and of no effect."

"The mining law of this state allows a person to locate a mining claim for himself and others, with his name and that of the others on the location, and designating of the claim; and where one person thus locates a claim or lode for himself and those others, even though the others have no knowledge of the location, they by the same become tenants in common with the locator, and cannot be divested of their interests by the locator afterwards tearing down the notice, and posting another omitting their names, unless this is done with their knowledge and consent." There was no error in refusing these instructions. The evidence shows that Runkle had long since abandoned whatever rights he may have acquired in this claim. He was not a party asserting any rights in the action; nor does it appear that the appellant, Craig, or any one else, was authorized to represent him. It was a matter in which the appellant had no personal interest; and, had these instructions been given as prayed for, they would necessarily have introduced a false issue into the case. They were therefore properly rejected.

4. Was the verdict of the jury against the evidence and the instructions of the court? For the appellant it is insisted that as the original certificates of location of both claims were excluded for defects therein, and as the appellant was prior in point of time in making and recording the amended certificate, that thereby the appellant acquired the ground in controversy, and that the appellees lost the same. The discovery by Parry of the

Bristol on August 4, 1880, is conceded, together with the posting of the notice thereon showing the extent of the claim. On the 6th day of September thereafter, the appellant Craig met Parry, and, in a conversation with him, stated that he was on Parry's ground, and proffered purchasing a portion of the same from Parry. This conversation occurred away from the premises, two days after the date of the discovery of the Mammoth by appellant, and shows the knowledge of appellant of the Bristol claim, and the extent thereof. Parry had sixty days from August 4th in which to do the discovery work. The encroachments of appellant Craig on the Bristol during that time were trespasses, and no rights inured to appellant Craig thereby. The discovery work was duly done upon the Bristol, and it was duly staked. The location certificate was made thereafter, and recorded November 4, 1880. The certificate of location was defective, for the reason that it did not make reference to some natural object or permanent monument, so as to identify the claim, and for that reason was excluded from the evidence in the case; but testimony was admitted to show that by the amended location certificate of December, 1881, recorded January 12, 1882, that the same ground was thereby covered that had been covered by the original certificate. So it is apparent that at the time defendant Craig located the Mammoth, to wit, September 4, 1880, the ground in controversy here was in such possession of Parry, as locator of the Bristol; that Craig was a trespasser thereon, and obtained no rights thereto by such trespass. *Mining Co. v. Mining Co.* 6 Colo. 380; *Ehrhardt v. Boaro*, 2 Colo. Law Rep. 89. And it appearing from the evidence that Parry made a location of the Bristol, valid in all other respects, but failed to file for record a valid certificate thereof, it follows that the amended certificate, made before Craig (through location acts performed after the expiration of Parry's time for locating) had acquired intervening rights, would, as

to Craig, relate back to, preserve and keep intact the Bristol claim as originally located and staked. There was no forfeiture or abandonment of the Bristol by appellees; so that, as against appellant Craig, by the execution of the amended location certificate of the Bristol in December, 1881, and recording of the same in January, 1882, the appellees continued to be the rightful possessors of the ground in controversy.

The judgment should be affirmed; RISING and MACON, CC., concurring.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the district court is affirmed.

Affirmed.

HOOSAC MINING & MILLING CO. V. DONAT.

1. The act of an agent outside of the line of his authority is not binding upon the corporation, but corporate liability may ensue from the subsequent ratification of the unauthorized act.
2. Where a complaint in an action for damages avers the making of a certain contract by a corporation, it is competent to show either an original execution with due authority or a subsequent ratification; and an allegation in the answer that there was no ratification amounts merely to a traverse.
3. Ratification of an unauthorized contract is often presumed from the failure of the principal to repudiate within a reasonable time after notice of its existence; provided, the other party, in good faith, expends money and labor under it.

Error to County Court, Clear Creek County.

THE complaint in this case, filed by the plaintiff, Donat, alleges that on the 8th of March, 1884, plaintiff and defendant entered into an agreement in writing, by which defendant leased to plaintiff, for the period of one year, part of a certain mining claim therein described; that plaintiff was put in possession thereof by the defendant

10	529
18	550
10	529
7a	390
10	529
25	109
10a	149
10	529
17a	813

company under said lease; that plaintiff complied in every particular with the terms and conditions of the lease, but that on or about July 10, 1884, he was ousted from the premises by defendant and wrongfully and unlawfully excluded therefrom; that at the time of said ouster he had disclosed large bodies of ore, which, under the terms of the lease, he was entitled to mine and extract, retaining eighty per cent. of the proceeds; that by reason of the said wrongful acts of defendant he was damaged in the sum of \$2,000.

The answer contains specific denials of all the material allegations in the complaint. But for "special and further answer and defense" the defendant alleges that the pretended lease mentioned in the complaint, executed in its name by one J. J. Elliott, was wholly unauthorized; that said Elliott was never an officer of the company and never its agent, except temporarily to take care of certain of its property; that he never had any authority whatever to make said pretended lease; that the same was executed without the knowledge or consent of the company, and that as soon as its duly authorized officers were advised of the said pretended lease the same was repudiated by it; and that neither the company nor any authorized officer or agent has ever directly or indirectly approved of or ratified the same. To this answer no replication was filed.

The following are all the material facts not sufficiently stated in the opinion: The defendant corporation was in the hands of eastern parties. Boston was its principal place of business. There its books and records were kept, and there its directors held their meetings. It was represented in Colorado by a single officer or agent. The "managing director" first appointed resigned and returned east; afterwards one Calhoon was elected to the office of superintendent and came to Colorado. During the interval between these two administrations, of more than sixty days, Elliott and one Caim were each in turn

the sole agent in charge of the property and business, though neither was ever regularly elected to the office of managing director or superintendent. Soon after Elliott was left in charge he executed the lease to plaintiff. At that time he was in correspondence with the principal officers of the company; letters were exchanged almost daily; he immediately notified the president and secretary of the lease, and received letters from them thereafter; no mention of the lease was made by the company or its officers; and no objection was interposed until Calhoon took charge of the business, some fifty-one days later. Calhoon told plaintiff that he did not think his lease was legal, and requested him to stop work; yet Calhoon himself had no specific instructions from the company controlling his conduct in the premises. He testifies that he requested plaintiff to stop work until he could hear from the company; also that he immediately wrote the company for instructions on the subject. No communication concerning the lease was received from headquarters for something like seventy-two days after Calhoon's letter was mailed. In the meantime Calhoon had given plaintiff written permission to re-enter the mine and continue his work under the lease. While Elliott was in charge, one Curtis, a director of the company, came to Colorado, visited the property, saw plaintiff at work and knew of the lease, but made no objection whatever. Plaintiff did a great deal of dead work, and lost money under the lease; but when ousted he had considerable fine-looking ore in the top and breast of his drift or tunnel; the small profits realized from the sale of ore taken out by him were retained by Calhoon. Calhoon testifies that when he permitted plaintiff to resume work he informed him that no word had been received from the company on the subject; that he acted upon his own responsibility, and that when the company did respond he (plaintiff) might be required to abandon the property. Plaintiff testifies that no such talk was had; that, on the

contrary, he supposed, and was led to suppose, that Calhoon had received a response from the company, and that his written permission to continue work under the lease was in accordance with such response. Calhoon's letter corroborates plaintiff's statement. It reads:

"IDAHO SPRINGS, 21st May, 1884.

"*Peter Donat* — SIR: This is to inform you that the Hoosac Mining & Milling Company, represented by me, *have decided* that you are at liberty to continue work under the lease granted you by J. J. Elliott.

"Yours, etc., JOHN R. CALHOON, Supt."

The cause was tried by the court without a jury, and judgment rendered in favor of plaintiff for \$1,040.60. To reverse this judgment the present writ of error was sued out.

Mr. H. W. HOBSON, for plaintiff in error.

Messrs. HANKEY and WHITE, for defendant in error.

HELM, J. It may be important to note at the outset that this is not a suit for possession under the lease mentioned in the pleadings; it is an action for damages arising from an alleged violation of the contract. A careful examination of the record before us shows clearly that Elliott, who undertook to execute this lease, acted without sufficient authority in the premises. We shall assume that because of this want of authority the lease was originally not binding upon the company, and proceed to inquire whether the company's subsequent acts or omissions rendered it liable to plaintiff under the pleadings. A proper answer to this inquiry involves the consideration of two questions: *First*. Did the pleadings entitle plaintiff to the benefit of evidence tending to establish liability through the doctrines either of ratification or estoppel? and, *second*, if such proofs were admissible under the pleadings, did plaintiff thereby maintain his right to relief in the premises?

The answer alleges as new and affirmative matter that when the company learned of the so-called lease it refused to recognize the same, or to be bound thereby, and expressly repudiated the agency and act of Elliott in connection therewith. Defendant contends that plaintiff's failure to deny these averments of the answer was an admission of their truthfulness, and deprived him of the right to introduce evidence in support of a subsequent ratification by the company. We do not think this position well taken. The proposition is elementary that a corporation acts only through its officers and agents. It is a rule of pleading scarcely less elementary, that the allegation in the complaint that defendant made and executed the written contract referred to sufficiently avers the making of the instrument in behalf of the company by its duly authorized officers or agents. "The legal effect is the same whether it is said the company made the contract, or that it was made by the president and directors of the company. They both mean the same thing." *Insurance Co. v. McDowell*, 50 Ill. 120; *Partidge v. Badger*, 25 Barb. 146. But the averment that a certain contract was made by the corporation, through its authorized agent or officer, may be sustained by proof of subsequent ratification. Since the ratification is admitted to have a retroactive effect, it is treated by the decisions as tantamount to original authority. "The ratification by a principal of an unauthorized act of an agent has a retroactive efficacy; and being equivalent to an original authority, we think that an allegation of due authority is sustained by the proof of such ratification." *Hoyt v. Thompson's Ex'r*, 19 N. Y. 207. The court in that case held that evidence of a subsequent ratification by the corporation was properly admitted, although the pleadings referred only to the making of the contract in the first instance. We conclude that it was competent for plaintiff to sustain the averment in his complaint by proof, showing either an original execution of the lease

with due authority, or a subsequent ratification of Elliott's unauthorized act. This being true, it follows that we must regard the allegations of the answer relating to ratification as stating no new matter calling for denial by replication; in legal effect they amount only to a traverse of matter already set out by the complaint.

This brings us to the second question above stated, viz.: Is plaintiff entitled to recover upon the evidence introduced? Without discussing at length the subjects of ratification by corporations, or their estoppel by conduct, we shall answer this question affirmatively. Conceding that, under the company's by-laws, a lease of part of its realty could only be made or ratified by act of its board of directors; conceding also that such action as a matter of fact was never had in the case at bar,—liability to the plaintiff is not thereby avoided. Ratification of an unauthorized contract is often presumed from the failure of the principal to repudiate within a reasonable time after notice of its existence; provided the other party in good faith proceeded to and did expend money or labor under it. For more than one hundred days after notice (by due course of mail) was given its president and secretary, the company remained silent. In the meantime plaintiff was permitted, by its agents in charge, to expend both labor and money, without return, in developing its property. Nor is this all; during upwards of sixty days of the time mentioned plaintiff acted under the additional authority of Calhoun's letter. Calhoun was the superintendent and duly accredited agent of the company; he was its sole representative in Colorado, and had entire control of its property and business here; he did not undertake to act upon his own responsibility with reference to the lease; on the contrary, he informed plaintiff that he had no sufficient authority; he corresponded with the company, and according to the weight of evidence, including his letter, gave plaintiff to understand that the company by proper proceeding had sanctioned the lease. Under these cir-

cumstances defendant cannot be held free from liability.

But, while holding that plaintiff was entitled to recover, we must hold the sum awarded excessive. He tendered no evidence showing the amount of his expenditures; he did not undertake to prove the exact number of days' work he performed individually under the lease, nor the value of such work. Neither did he offer any other proofs from which a court or jury could determine the extent of his injury in connection with the transaction. No punitive damages were asked, and, under the present rule in this state, none could be given. *Murphy v. Hobbs*, 7 Colo. 541. Nominal damages only should have been allowed plaintiff upon his own evidence. But under the terms of the lease he was to have eighty per cent. of the proceeds from ore extracted by him. The certificates of mill-runs introduced by defendant show that the sum of \$68.53 was realized by it in this way. We think the court might have awarded him eighty per cent. of this amount, but can find nothing to justify the recovery of \$1,040.60.

We deem it unnecessary to remand the cause for a new trial. The judgment of the court below will be modified, and judgment entered in this court awarding plaintiff \$54.83. The costs of the appellate proceedings will be equally divided between the parties.

Judgment modified.

INGOLS V. PLIMPTON ET AL.

1. Under the act of February 10, 1888, superior courts in cities or incorporated towns have jurisdiction of appeals from justices of the peace in civil actions.
2. There can be no set-off when the claims are not mutual. A joint demand cannot be set off against a separate demand.

10	535
11	611
10	535
13	404
10	535
17	508
10	535
23	499
10	535
17a	428

3. An instruction which leaves an issue to the belief of the jury, instead of requiring the jury to determine the issue upon the evidence, is erroneous.
4. In an action for rent defendants set up a counter-claim for goods sold plaintiff's son, claiming that plaintiff and her son were partners, and that they had agreed to credit the amount of the bill on the rent; the partnership and agreement were denied. The jury were instructed to allow the claim if they believed the partnership existed. *Held* error, since the individual debt could not be set off against the firm liability without plaintiff's consent, which latter was thus withdrawn from the consideration of the jury.

Error to Superior Court of Denver.

FRANCIS E. INGOLS, plaintiff, sued George E. Plimpton *et al.*, defendants, for rent. Judgment for defendants and plaintiff appealed.

Mr. E. MILES, for plaintiff in error.

No appearance for defendants in error.

BECK, C. J. Francis E. Ingols, plaintiff in error, sued the defendants in error before a justice of the peace residing in the city of Denver, to recover the sum of \$40, alleged to be due and owing her for one month's rent of a house. On the 10th of March, 1883, she recovered a judgment for the amount demanded, whereupon defendants appealed to the superior court of the city of Denver. Plaintiff's counsel moved to dismiss the appeal on the ground that the superior court did not have jurisdiction to entertain or try appeals from justices of the peace in civil actions. The motion was overruled by the court, and case tried to a jury, who rendered a verdict for the defendants.

The ruling of the court on the motion to dismiss said appeal is made the basis of the first four assignments of error. This raises the question whether the act of the legislature, providing for the organization of superior courts, approved February 10, 1883, gives to these courts jurisdiction of appeals from justices of the peace in civil

actions. Section 17 of the act is as follows: "Appeals from any final decision of a justice of the peace in a city or incorporated town where a superior court is held, or from the decision of any police magistrate of such city or town, in any case involving the violation of a city ordinance, may be allowed to the superior court of such city or incorporated town, and may be taken in the same manner as appeals from justices of the peace in other cases." The counsel for plaintiff in error lays down the proposition that the foregoing section invests the superior courts with jurisdiction of appeals from justices of the peace and police magistrates only in cases involving violation of city or town ordinances. We are of opinion that the phraseology and structure of the section will not admit of this interpretation. Two classes of appeals are clearly provided for,—one, "from any final decision of a justice of the peace in a city or incorporated town where a superior court is held;" the other, "from the decision of any police magistrate of such city or town in any case involving the violation of a city ordinance." The only qualification of the language employed is found in that clause of the act which limits the jurisdiction of the superior courts to civil actions.

But counsel argues that superior courts are constructed, by sections 1 and 3 of the act, courts of the same class and grade as the district courts, and that, since the latter courts are not vested with jurisdiction of appeals from justices of the peace in civil actions, it would render the act unconstitutional to hold that the former are vested with such jurisdiction. Two constitutional objections are specified: *First*, that the constitutional provision requiring the jurisdiction and practice of courts of the same class and grade to be uniform would be violated; *second*, this construction would give advantageous remedies to citizens of cities and incorporated towns not given to other citizens of the state. The first objection is answered by the case of *Darrow v. People*, 8 Colo. 417,

wherein it is decided that the district and superior courts are not courts of the same class or grade. As to the second objection, we observe that cities and incorporated towns enjoy many advantages of the character referred to, which are not given to other citizens of the state; and we are not advised that any clause of the constitution is violated thereby. The creation of superior courts for such cities and towns is an example, and this example exposes the fallacy of the latter objection.

Referring now to the errors alleged in the proceedings of the trial in the superior court, and the exceptions taken, it is apparent that the judgment must be reversed for the error of the court in its second instruction. The real controversy was over a counter-claim presented by defendants in error of \$33, for a bill of merchandise purchased from defendant George E. Plimpton by one Rollins, son of the plaintiff in error. Defendants introduced testimony tending to prove that plaintiff and her son were partners in business, and that these goods were purchased for their joint use and benefit; that both the plaintiff and her said son had thus represented their business relations to the defendants, and promised them that this bill would be allowed upon the plaintiff's account for rent. The plaintiff denied the partnership relation with her son, or that any such representations or promises had been made, and the testimony was conflicting as to all these matters. The second instruction is as follows: "If you believe in this case that Mrs. Ingols was the proprietor of that establishment, with her son, of course you will find for these defendants to the extent of that claim; because, if she was the proprietor in fact, I think it will be proper to allow the amount, inasmuch as the bill was tendered receipted, and, as the proof shows, the amount of the balance was tendered in money." By this instruction the allowance of the counter-claim is made to depend on the belief of the jury that the plaintiff and her son were joint proprietors of the business for

which the goods were purchased from defendant George E. Plimpton. It tells the jury to allow the counter-claim if they believe such partnership relationship existed, making this single fact the test whether the claim should be allowed or rejected. The facts that the bill for the goods was tendered by the defendants to the plaintiff receipted, and the balance of the rent account tendered in money, do not aid the legal proposition. The instruction is radically erroneous in not making it an additional requisite to the allowance of the defendant's claim that the plaintiff should have promised to apply it on the rent account. The plaintiff appears to have been the sole owner of the house leased to the defendant or defendants, as the case may be. The contract of lease was with the plaintiff alone, her son having no interest therein. The mere fact, therefore, that the firm of which she was a member purchased goods from the defendants, would not alone constitute the amount due therefor a legal set-off to the plaintiff's cause of action for rent due upon the lease contract. There can be no set-off where the claims are not mutual. A joint demand cannot be set off against a separate demand, as has been frequently decided. This instruction, standing alone, is likewise faulty in leaving the issue as to the partnership to the belief of the jury, instead of requiring the jury to determine it upon the evidence. *Saloman v. Webster*, 4 Colo. 353, 363; *Miller v. Balthasser*, 78 Ill. 302; *Railway Co. v. Ingraham*, 77 Ill. 309.

It is unnecessary to consider the remaining assignments. For the error in the instruction concerning the counter-claim, the judgment is reversed and cause remanded for a new trial.

ELBERT, J. (*concurring*). I concur, but my conclusion is in nowise based upon the proposition that the second instruction, "standing alone, is faulty in leaving the issue as to the partnership to the belief of the jury, in-

stead of requiring the jury to determine it upon the evidence." (1) The instruction does not "stand alone," and the point decided is not in the case. (2) If it is intended to say that the instruction, by reason of the omission of the formal words "from the evidence," is *substantially* faulty, and without more, in a civil cause, affords good ground for reversal, I do not agree to it.

Reversed.

COWAN V COWAN.

10	540
12	514

10	540
4a	509

10	540
29	298

10	540
31	444

1. It is not necessary to reserve exceptions to the several provisions of a decree or judgment to entitle a party to assign error, and have reviewed any alleged defect therein, provided a general exception has been duly taken to the judgment or decree.
2. It is sufficient to justify the granting of an order upon application for alimony *pendente lite*, that a *prima facie* case is presented by the complaint, and that it be made to appear that the necessities of the wife and the financial ability of the husband render such order proper and necessary.
3. Where an injunction issued enjoining a defendant from incumbering or selling his property on the filing a bill for divorce, and the injunction remained in force at the time of an application for temporary alimony, the defendant, in order to avail himself of the fact as a ground of defense, must set up the fact in his answer to the petition. An averment that his answer to the original complaint is made part of his answer to the petition is insufficient.
4. There being no certainty, nor even a promise, that an arrangement for supplies would be continued throughout the litigation, an order on the subject requiring the defendant to pay a stated sum monthly for the purchase of the supplies for the plaintiff and her children, *held* to be proper and necessary.
5. On the hearing of a petition for alimony *pendente lite*, it was shown that the wife, with her children, occupied the same house with her husband, but that he slept in a room to himself, did not eat at the same table, and that they did not cohabit as husband and wife at the time of the filing of the bill and for many months previous. *Held*, this was such an abandonment of the relation as would entitle the wife to alimony *pendente lite*.
6. This court will not interfere with an order allowing temporary alimony unless it shall appear that there has been a clear abuse of discretion or a violation of the law by the lower court in the order made.

Appeal from District Court of Arapahoe County.

THIS is an appeal from an order of the district court awarding alimony *pendente lite* to the appellee, pending proceedings upon her complaint for a divorce, which she filed therein November 17, 1885. The petition for alimony makes the complaint for divorce a part thereof by reference. It appears from the complaint that the parties were married February 4, 1875, and lived and cohabited together until November 13, 1884; that they have three minor children, the fruits of their marriage; and that at the time of the grievances complained of, they were living together in the city of Denver, where they had resided for many years. The grounds for divorce charged against the defendant were adultery, extreme cruelty, and desertion. The defendant is likewise alleged to be an unfit person to have the care and custody of the children. Upon these charges the plaintiff prays for a decree of divorce, that the custody of the children be decreed to her, and for permanent alimony. The defendant is alleged to be a man of large means; that prior to his desertion of the plaintiff and her said children, which is stated to have occurred about the 11th of October, 1885, he had converted all his property into money, except their residence property (in which plaintiff and her children are still residing), and certain lots described, all in the city of Denver; and that this entire property, which she estimates at the value of \$20,000, has been put into the hands of a real estate agent by the defendant for sale; that the defendant departed the state with the intention of staying away, and had provided no adequate support for the plaintiff and her family. A temporary writ of injunction was prayed, restraining the sale of the property described, pending this proceeding for divorce. Defendant appeared and answered the complaint January 1, 1886. He denied specifically all the acts of misconduct charged against him, including the alleged desertion and

failure to make suitable provision for the support of his wife and family; averred that his absence was only temporary; that he had bountifully provided for them before leaving home, and since his return as well, setting out the nature and extent of the provision so made, which included the furnished house still occupied by the family. He denied the allegations of the complaint concerning his wealth, and averred that his entire estate, real and personal, did not exceed the sum of \$23,000, estimating the Denver property at \$22,000, and that he had no means of raising money for any purpose except upon the security of this last mentioned property, and that he was enjoined by the order of the district court from selling or incumbering it. He denied the charges as to his unfitness to have the charge and custody of his children, averring his qualifications and fitness. The answer also contains counter-charges of a serious nature against the plaintiff. These charges, together with all new matter, are denied by the plaintiff's replication.

Referring now to the pleadings upon the present application, the plaintiff's petition for temporary alimony was filed about, or prior to, June 1, 1886. It avers that the defendant's Denver property is of the value of \$25,000, and that she believes he is possessed of other means of considerable amount. She states therein that he has only furnished for the support of herself and children since the verification of the complaint for divorce (November 14, 1885), up to the presentation of this petition, in money, collectible securities and credit, the sum of \$750, which she states to have been insufficient to pay the actual living expenses of herself and children; but that by keeping boarders and living very economically she has managed to get along and to save from all sources about \$300 in money, which she has on hand and is retaining against sickness or other contingency, and that this sum constitutes all her moneys and all her resources. The petition further states that the plaintiff has employed one law

firm to prosecute her suit for divorce, and that defendant has employed two prominent law firms and one additional attorney to resist her said application; that her attorneys are demanding \$500 on account of their services; that she will require at least \$100 to prepare for trial, procure the attendance of witnesses, the testimony of absent witnesses, and to pay other costs and expenses; that she will need during the pendency of her litigation, for the support of herself and children, \$250 per month; and prays that defendant be ordered to pay said several sums, and that she and the children have the uninterrupted use of said residence until the final determination of the suit. In response to this petition defendant avers that the petitioner has realized up to date, from moneys, credits and securities furnished by him during the time covered by her petition, upwards of the sum of \$1,092.54; alleges its sufficiency for the purposes and time mentioned; denies the necessity for keeping boarders; alleges that on his return from the Pacific coast, after the filing of the plaintiff's complaint, he made arrangements with merchants and other persons of the city of Denver to supply plaintiff and the children with all proper food, clothing and other supplies, and so notified her, and in addition has supplied them an excellent home without any cost or expense whatever to the petitioner. These averments are traversed by the plaintiff's replication. The defendant denies that his property is of greater value than stated in his answer and denies that he has other means than as therein stated. He resists the application for the order to pay said several sums of money petitioned for, alleging the same to be unnecessary and the estimates and charges mentioned to be exorbitant. He also makes, by reference, his answer to the original complaint part of his answer to this petition. The application for temporary alimony was heard June 1, 1886, upon the petition and answer thereto, the pleadings in the original cause and the affidavits of the parties and of other persons. Upon

the hearing the court ordered defendant to pay into court on or before June 15, 1886, for plaintiff's attorneys, \$300, and for the use of the plaintiff personally \$50, and on account of court costs, accrued and to accrue, \$100; that thereafter he pay plaintiff for her use \$25 per month, and that he allow plaintiff and the children to live in the house wherein they now reside. Defendant's counsel excepted to the said order and assigned fifteen errors to the making thereof.

Messrs. MARKHAM and DILLON, H. E. LUTHE and T. D. W. YONLEY, for appellant.

Messrs. BENEDICT and PHELPS and B. L. POLLOCK, for appellee.

BECK, C. J. The several assignments of error in this case question the validity of the order of the court below, entered June 1, 1886, allowing alimony *pendente lite* to the plaintiff below, Laura Cowan, alleging each provision thereof to have been unwarranted upon the law and the evidence.

A general exception was reserved to the order, and counsel for the appellee raise the point that, under such an exception, the several provisions of the order cannot be reviewed, and that, unless the exception be sustained to the order as a whole, it must fail. Several decisions of this court, based upon a statutory provision which has been in force since the organization of the court to the present time, hold that exceptions must be made to the opinions and decisions of the trial courts, in causes tried thereto without juries, in order to authorize their review here on appeal or writ of error. It has never been held, however, under this or any similar statute, to our knowledge, that it was necessary to reserve exceptions to the several provisions of a decree or judgment, to entitle a party to assign for error, and have reviewed, any alleged defect or error therein, provided a

general exception has been duly taken to the judgment or decree. None of the authorities cited in support of the foregoing proposition of appellant's counsel are authority upon the point; nearly all relating to exceptions taken to instructions to juries, which we do not regard as analogous. We are of opinion that the exception taken to the judgment in this case is sufficient to authorize its review upon the law and the evidence.

We will now consider the errors assigned to the order of the court. The provisions thereof for suit money, and the provisions for temporary support, are all alleged to be excessive, and unsupported by the law and the evidence. As we said in the case of *Daniels v. Daniels*, 9 Colo. 150, the rule governing the allowance of alimony *pendente lite* "is based upon the existence of the marriage relation, the ability of the husband, and the destitute circumstances of the wife. If the wife presents such a case against her husband as *prima facie* entitles her to relief, the rule is that she shall be supplied with the necessary means to prosecute her suit on an equal footing with her husband; also, if she be destitute of the means of subsistence, and the husband is possessed of the means to relieve her necessities, it is the duty of the court, when called upon, to award a reasonable allowance for this purpose." It is a well-settled rule, also, in applications of this character, that unless a clear abuse of discretion in making the order appears, the provisions for suit money and temporary support will not be interfered with by the appellate court. Respecting the merits of the application for divorce, and the merits of the defense interposed thereto, we are not now concerned. It is sufficient to justify the granting of an order upon an application like this that a *prima facie* case is presented by the complaint, and that it be made to appear that the necessities of the wife, and the financial ability of the husband, render such order proper and necessary.

The objections made to the amount of the allowance

are based largely upon the alleged value and condition of the appellant's property. Viewed on such considerations, it is contended that they are excessive. According to the appellant's own estimate of his resources, as set forth in his answer to the complaint, he is possessed of real estate in the city of Denver of the value of about \$22,000, and of other property of the value of about \$1,000. The means of the wife, aside from the credit alleged to have been given her to purchase necessities, does not appear to much, if any, exceed the sum of \$300. We regard this a sufficient showing to make it the duty of the court to award the wife a reasonable amount of suit money, and the amount awarded for this purpose does not appear to be unreasonable or excessive, in view of the circumstances of the parties.

But it is objected that the appellant's real estate produces no income, and that the appellee, upon filing her bill for divorce, obtained an order of the district court enjoining the appellant from either selling or incumbering any of said property; also, that the appellant has no other means of raising money for any purpose whatever. If such a showing had been clearly made on the hearing of the petition for temporary alimony, it would have been available; for it would certainly be inequitable, as well as unreasonable, to require appellant to pay specific sums of money, the amount thereof being based principally upon the estimated value of unproductive real estate owned by him, while he was enjoined from raising money thereon either by sale or mortgage. But such a defense was neither specifically interposed nor proved. The only information before us that an injunction ever issued is an averment to that effect in appellant's answer to the original complaint. If an injunction issued on filing the bill for divorce (November 17, 1885), and still remained in force, unmodified, at the time of the application for temporary alimony (June 1, 1886), and it was appellant's intention to avail himself of these facts as a

ground of defense thereto, he should have set them up in his answer to the petition. An averment that his answer to the original complaint is made part of his answer to this petition falls short of such an allegation. Neither the continued existence of the injunction, nor its disabling effect on the appellant, appears to have been mentioned at the hearing, either in his pleadings or in his proofs. He has not even assigned it for error. It is not, therefore, a ground for reversal. But a court will not enforce a requirement when it is satisfactorily made to appear that the court's own action has rendered its performance by the respondent impossible; so, if relief should hereafter become necessary upon this ground, the application therefor must be made to the district court, which has the power to make any necessary and proper modification of its order.

We now come to the objections urged against the provisions made for the temporary support of the petitioner and the children. One of the contentions is that the wife is not entitled to the exclusive custody of the children, and for that reason the court was without jurisdiction to order the means for their subsistence to be placed in her hands. It appears from the pleadings and the evidence that, prior to the filing of the complaint for divorce, the appellant went abroad, leaving the children with the appellee, under circumstances that led her to believe that he did not intend to return. Her complaint for divorce, subsequently filed, alleges desertion as one of the grounds of the application. That charge, with others, is denied, but the children have ever since remained in the care and custody of the wife, and it does not appear that appellant has taken any steps to interfere with such custody, save his claim that their custody be awarded to him on the final hearing. So far, therefore, as the present proceeding is concerned, the subject of the custody of the children is not in issue.

Of the other objections relating to the provision for the

temporary support of the petitioner and said children, one is that there was no necessity for requiring appellant to furnish necessities, since it appears that he has never neglected or refused to do so, but ever since the institution of this suit has liberally supplied all their wants. Appellant admits that he has not given the petitioner any money, and that he has and still continues to refuse to do so. He avers that the support given has not been wholly furnished out of means which he had on hand, but in part by credit extended to him by his friends. In another paragraph of his response to the petition, he says "he made arrangements with certain merchants and others to supply petitioner and said children with all proper clothing, food, fuel and other supplies; and then and there informed petitioner at what places, and from what persons, she might purchase on his credit all things necessary and proper for the support and maintenance of herself and said children." If appellant's statements in this behalf were uncontradicted, and it appeared that he was making such provision in good faith, with the intention of continuing the same during the litigation, this portion of the order would seem to be unnecessary. But the petitioner swears that no such provision was made until about the time of filing her petition for temporary alimony, and avers her belief that it was then done to affect her standing in court; that appellant gave no assurance that this provision would be continued for any specific time, but, upon inquiry, refused to make any promise or assurance whatever. This part of the order as entered, viz., "that defendant also, from this time forth, in addition to the monthly allowance, do furnish for the plaintiff and her children all reasonable food, fuel and clothing, or provide for her obtaining the same on credit," was evidently made for the convenience of the appellant, and so framed that a continuance to furnish needful supplies on his credit would satisfy its requirements. In the condition of the proofs the court would

have been justified in requiring the appellant to pay a stated sum monthly for the purchase of these supplies, as prayed for in the petition; the monthly allowance referred to in the order, \$25, being merely for incidentals. An order on the subject was both proper and necessary; there being no certainty, nor even a promise, that the arrangement for supplies would be continued throughout the litigation. Where an application by a wife for temporary support was denied at *nisi prius*, on the ground that the husband *was* providing for her maintenance, it was held to be error and the judgment reversed therefor. *Pinckard v. Pinckard*, 22 Ga. 31.

Another legal objection made to the order is that it puts the wife in possession of the husband's mansion-house. Counsel say there is no averment in the petition on which such an order can rest; that there are no circumstances which can excuse or palliate it, and that the law does not tolerate such an order. That petitioner and the children be allowed to occupy this house is included in the prayer of the petition. Its averments, and likewise the circumstances of the wife and children, as disclosed by the evidence, show it to be a present necessity that they have a house to live in, unless permitted to continue in the occupancy of the one furnished by the appellant. No objection was made to this arrangement on the hearing, or prior thereto; on the contrary, one of the grounds of objection to an allowance for their temporary support was that appellant had furnished them this house. The averment of his answer on this point is "that he not only supplied said petitioner and said children with food, fuel and clothing, but likewise supplied them with an excellent home, without any cost or expense whatever to the petitioner." The attention of the court being thus called by the appellant himself to the fact that he had provided a home for petitioner and the children, we know of no legal objection, under our statute and practice, to the sanctioning, *pro tempore*, by the court of the provis-

ion so made by the appellant himself, with a direction that he continue the same. Appellant's object in directing the court's attention to this arrangement was doubtless to defeat an allowance for the same purpose in money, and probably, also, to obtain a recognition of his right to continue in the occupancy of the room in said house, which right is insisted upon in his averment. He was successful as to both objects, and the only foundation for the objections now urged would seem to be that the court required him to continue these arrangements which he had made during the pendency of the litigation. The objection seems to us to lack both merit and legal support.

But the objections do not end here. The power of the court to make any provision for the support of the petitioner is challenged by the following legal proposition, viz.: "The fact that appellee was, at the time of instituting her suit, residing in the dwelling with appellant, and continued to do so at the time of passing this order, excluded all power on the part of the court to make any allowance of alimony *ad interim*." The authorities cited in support of said proposition are *Anshutz v. Anshutz*, 16 N. J. Eq. 163; *Chapman v. Chapman*, 25 N. J. Eq. 394; *Tayman v. Tayman*, 2 Md. Ch. 393; 2 Bish. Mar. & Div. § 384. We do not think these authorities sustain the proposition, and it is our opinion the law is otherwise on the facts of the present case. It clearly appears from the proceedings and proofs of both parties that they were not cohabiting as husband and wife, either at the time of filing the petition for alimony, or at the time of the hearing below, nor for many months previous to the filing of the original complaint. Nor did they in all this time eat at the same table or in any sense of the term "live together." The appellant merely occupied a room in the same house; boarding elsewhere. These being the conceded facts, it matters not, so far as the validity of this order is concerned, that appellant charges this condition

of affairs to the misconduct and fault of his wife. In the citation from Bishop, *supra*, it is said that, where a suit is pending for divorce, it is legally improper for the parties to live in matrimonial cohabitation; and, "even if the husband offers to support the wife in his own house, with separate beds, she should not accept the offer." To these propositions the author cites *Sykes v. Halstead*, 1 Sandf. 483, and *Pinckard v. Pinckard*, 22 Ga. 31. The cases cited do not support the text to the extent claimed by the appellant. In *Sykes v. Halstead* the plaintiff sued the defendant for coal furnished defendant's wife during the absence of the latter from the home of the husband, pending her action against him for divorce. The defense was the husband's offer to provide board for his wife in the same house with him, with a separate room. The court held it to be no defense, since the wife was not bound to live in the same house with her husband after instituting proceedings for divorce. *Pinckard v. Pinckard* holds it to be error to deny the application of a wife for temporary alimony pending her suit for divorce, on the ground that the husband has made provision for her support. Beyond this ruling, the views of the court are expressed in favor of an order in such cases directing payment to be made by the husband of a certain sum of money for the use of the wife periodically, in accordance with the practice of the court. In support of this practice, the court says this course prevents the endless alterations and confusion which would result from intrusting the maintenance to the husband, where the parties are alienated in feeling, as they always are in such cases. There is no intimation in either of the foregoing decisions that it would be illegal for the wife to accept such support during the pendency of her suit, when tendered by the husband, or that it would invalidate or nullify the proceedings for divorce. The extent to which the authorities have gone is to hold that the parties must not cohabit during the pendency of said proceeding. The New Jersey

cases cited hold the parties may properly live under the same roof pending the proceedings. *Anshutz v. Anshutz*, 16 N. J. Eq. 163, was an application by a wife for alimony only. The court held it necessary, under the New Jersey statute, that the bill should charge abandonment by the husband to authorize a decree, but observed: "There may be an abandonment or separation, within the sound construction of the act, while the parties continue under the same roof; as where the husband utterly refuses to have any intercourse with his wife, or to make any provision for her maintenance. He may seclude himself in a portion of his house, and take his meals alone, or board elsewhere than in his house, and thus effectually separate himself from her, and refuse to provide for her, as in case of actual abandonment." In *Chapman v. Chapman*, 25 N. J. Eq. 394, the wife had filed a bill for a divorce against her husband on the ground of adultery; but there was a petition in the same case to restrain him from entering into or remaining in the same house in which they resided until the termination of the suit. Each party claimed to own the house. The court, while holding it to be the duty of the complainant to cease cohabitation with her husband until the termination of the suit, declined to either exclude the husband from his home, or to declare it to be the duty of the wife to leave, although the foregoing citation from 2 Bish. Mar. & Div. § 384, and other authorities on these same points, were considered. Among other reasons assigned for the view taken, the court said: "Moreover, the parties in this case, though living under the same roof, occupy separate apartments. Their relations are apparently hostile. Each complains of the animosity of the other." The remaining case cited in support of the foregoing proposition, viz., *Tayman v. Tayman*, 2 Md. Ch. 393, contains the following remark by the court, that, if the wife "be living with her husband, an allowance of alimony *pendente lite* would be unnecessary and improper; but it

does not therefore follow that under such circumstances, upon application by her, the husband would not be made to supply her with money to fee counsel, and defray the expenses of the suit." In our judgment, the circumstances of the case now under review do not constitute a "living with the husband," within the rule of the last case.

Upon consideration of the authorities and arguments, and also upon a due consideration of the facts and circumstances of these parties, financial and contingent, we are unable to say that there was an abuse of discretion or a violation of the law in the order made by the district court. The judgment will therefore be affirmed.

Affirmed.

PEOPLE EX REL. RHODES V. FLEMING ET AL.

1. It is well settled in this state that the constitution is not a grant of power to the legislature, but that the legislature is invested with plenary power for all the purposes of civil government, and that the constitution is but a limitation upon that power.
2. The power to confer upon the persons named in the general law for the incorporation of cities and towns authority to do certain acts therein specified, not being prohibited by the constitution, such law is not unconstitutional by reason of the delegation of such authority.
3. This court cannot pass upon the expediency or policy of a statute; these are questions upon which the judgment of the legislature cannot be reviewed by the courts.

10	553
19	112
10	553
28	145
10	553
32	308

Appeal from District Court of Arapahoe County.

THE plaintiff, the people of the state of Colorado, by and upon the information of L. R. Rhodes, district attorney, brought suit against James A. Fleming and others to oust the defendant Fleming from the office of mayor of the town of South Denver, and to oust the other defendants from the office of trustees of said town. Defendants demurred to the complaint, which was sus-

tained, and judgment entered dismissing the case, from which plaintiff appeals.

Messrs. L. R. RHODES, BARTELS and BLOOD, and T. J. O'DONNELL, for appellants.

Messrs. JOHN HIPP and CHAS. H. TOLL, for appellee.

RISING, C. This action is brought to oust the defendant Fleming from the office of mayor of the town of South Denver, and to oust the other defendants from the office of trustees of said town. The complaint sets out the proceedings had in the incorporation of said town, which proceedings show that the provisions of the General Statutes relating to the organization of towns were fully complied with. The complaint further sets out that the area of said town is about nine square miles, and that a considerable portion of the territory included in the boundaries of said town is unoccupied and unimproved land, owned by non-residents of said town, and that most of the land embraced within the limits of said town is very sparsely settled or inhabited. Defendants demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. Demurrer sustained, and judgment dismissing the case entered.

The validity of the incorporation of the town of South Denver is assailed upon the ground that the statute under which the proceedings for incorporation were had is unconstitutional. It is claimed by appellants that the statute is in conflict with the provisions of article 3, Constitution, which reads as follows: "The powers of the government of this state are divided into three distinct departments — the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed

or permitted." The statutes claimed to be in conflict with said constitutional provision are sections 3299, 3300, General Statutes. Section 3299 is as follows: "When the inhabitants of any part of any county, not embraced within the limits of any city or incorporated town, shall desire to be organized into a city or incorporated town, they may apply by petition in writing, signed by not less than thirty of the qualified electors of the territory to be embraced in the proposed city or incorporated town, to the county court of the proper county; which petition shall describe the territory proposed to be embraced in the proposed city or incorporated town, and shall have annexed thereto an accurate map or plat thereof, and state the name proposed for such city or incorporated town, and shall be accompanied with satisfactory proofs of the number of inhabitants within the territory embraced in said limits." That portion of section 3300 assailed as invalid is as follows: "When such petition shall be presented, the court shall forthwith appoint five commissioners, who shall at once call an election of all the qualified electors residing within the territory embraced within said limits as described and platted, to be held at some convenient place within said limits." This section further provides the manner of giving notice of such election by said commissioners, and what the notice shall contain; that the commissioners shall act as judges and clerks of said election, and report the result of the ballot to said county court.

It is not claimed that the statute confers, or attempts to confer, upon the county court any legislative power; but it is claimed that the statute is unconstitutional, in that the power to determine the extent and boundaries of such municipal corporations is thereby conferred upon individuals, and that such power is vested in the legislature, and cannot be delegated to private persons. "One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws can-

not be delegated by that department to any other body or authority." Cooley, Const. Lim. 139. The constitution (sec. 13, art. 14) makes it the duty of the general assembly to provide by general laws for the organization of cities and towns. The statute under consideration was enacted in compliance with that requirement. The legislature cannot, by general law, fix the boundaries of towns and cities that may be thereafter incorporated under it. The operation of such general law must necessarily be made to depend upon contingencies, and the power to take the initiative steps to bring the law into operation upon the happening of the contingent event must be delegated to some body or persons. This power arises under the general rule "that when a constitution gives a general power, or enjoins a duty, it also gives, by implication, every particular power necessary for the exercise of the one or the performance of the other." Cooley, Const. Lim. 77. In speaking of a general law of Illinois, providing for the incorporation of cities and villages,—the terms of which law are as broad as our statute as to the territory to be included within the corporate limits, except that no more than four square miles shall be so included, and, as to the duties to be performed by the county judge, these are substantially the same as the duties performed by the county court and the clerk of said court under our statute,—the supreme court of that state say: "It would be absurd to suppose it was intended that, when the general law was enacted, it should bring into being all the corporations that could ever be organized under it, or that, every time a necessity should subsequently exist for the incorporation of a city, town or village, a general law should be enacted by the general assembly for that purpose. All that is practicable, or could have been intended, was that the legislature should, by a general law, provide for the incorporation of cities, towns and villages, or the change or amendment of their charters, leaving it to those interested to bring them

within its operation; and this has never, in this state, been held to be a delegation of legislative authority." *Guild v. City of Chicago*, 82 Ill. 472, 476. It must be understood that the legislative authority spoken of in the case last cited, as well as in all the decisions of the courts upon this question, is the authority to make laws, and that, when the authority conferred upon bodies or individuals is not an authority to make laws, then there has been no delegation of legislative authority within the meaning of the decisions. From the nature of the case, the general assembly is without power to do the acts required to be done to give effect and put in operation the general law for the organization of cities and towns. The passing of a general law is the limit of the power expressly conferred upon the general assembly for the organization of cities and towns, and, in passing such law, it has exercised all the legislative authority it can exercise at that time; but, in providing for the means for carrying the law into effect, it must of necessity confer upon some bodies or individuals the power to do such acts as could not be done by it. The fixing of the boundaries of such cities and towns is among the acts that must be performed by and through such conferred power. The power conferred upon the petitioners and the county court, and the clerk of said court, and upon the electors of the territory within the limits of the proposed city or town, is not a delegation of legislative authority, because it can in no sense be said to confer upon such individuals the power to make laws, in that it does not confer upon them the power to do that which the constitution requires of the general assembly to do.

It is claimed by appellants that the general assembly is not prohibited by the constitution from passing special laws for the incorporation of cities and towns, and that therefore it has full, complete and exclusive power to fix the boundaries of all cities and towns. We do not think this claim can be sustained. The constitution provides that

no special law shall be enacted by the general assembly where a general law can be made applicable. It also provides that the general assembly shall provide by general laws for the organization of cities and towns. By this last provision it is determined by the sovereign power that a general law for the organization of cities and towns can be made applicable, and it necessarily follows that all special laws upon that subject are prohibited. It is now well settled that laws delegating such power, in such a manner as is done under the statute under consideration, are not unconstitutional. *People v. Reynolds*, 5 Gilm. 1; *Clarke v. City of Rochester*, 28 N. Y. 605-634; *Bank v. Brown*, 26 N. Y. 467-475; *Currier v. Railway Co.* 6 Blatchf. 487; *Mayor v. Shelton*, 1 Head, 24; *People v. Salomon*, 51 Ill. 37; *Alcorn v. Hamer*, 38 Miss. 652; *Com. v. Quarter Sessions*, 8 Pa. St. 391; *Bull v. Read*, 13 Grat. 78-88; *Blanchard v. Bissell*, 11 Ohio St. 96-100; *Locke's Appeal*, 72 Pa. St. 491; *People v. Nally*, 49 Cal. 484; *Dalby v. Wolf*, 14 Iowa, 228. The law upon this question is clearly and forcibly stated by Field, J., in *Blanding v. Burr*, 13 Cal. 343-358, as follows: "Laws may be absolute, dependent upon no contingency, or they may be subject to such conditions as the legislature, in its wisdom, may impose. They may take effect only upon the happening of events which are future and uncertain, and, among others, the voluntary act of the parties upon whom they are designed to operate. They are not the less perfect and complete, when passed by the legislature, though future and contingent events may determine whether or not they shall ever take effect. * * * So, the legislature may confer a power without desiring to enforce its exercise, and leave the question whether it shall be assumed to be determined by the electors of a particular district. The legislature may determine absolutely what shall be done, or it may authorize the same thing to be done upon the consent of third parties. It may command, or it may only permit; and in the lat-

ter case, as in the former, its acts have the efficacy of law."

Counsel for appellants, while conceding that the power to fix and determine the corporate boundaries of towns may be delegated by the legislature, contend that such power must be delegated to some appropriate local body possessing political or legislative power, such as a board of county commissioners, and that it cannot be delegated to individuals. In considering the question whether the legislature has exceeded its power in enacting the statute under consideration, we look to the constitution, not for a grant of the power, but to ascertain whether the exercise of such power is prohibited; and, if it is not prohibited, the act is valid. *Alexander v. People*, 7 Colo. 155-160. There is no provision in the constitution expressly prohibiting the delegation of such power to individuals, and there is no provision requiring the delegation of such power to be made to political, legislative, or other bodies, from which such prohibition may be implied. Whether such power shall be delegated to boards of county commissioners or other local bodies, or to some individual, or collection of individuals, seems to us to be purely a question of policy or expediency; with which questions courts have nothing to do, in determining the validity of a statute. *Railroad Co. v. Smith*, 62 Ill. 268-271. An examination of the decisions of the courts seems to warrant the conclusion that it is well settled that the legislative power is not limited as claimed by appellants. In relation to the power of courts of quarter sessions in Pennsylvania, acting through commissioners, to erect new townships and divide old ones, it is said: "No one has ever doubted the constitutional right of the legislature to authorize the exercise of both these jurisdictions by the courts, because it has never been imagined that it bore any resemblance to the power of enacting laws. Indeed, it is so entirely dissimilar that an elaborate attempt to show the contrast would be a mere waste of words.

But, if the legislature can authorize courts to decide questions of this character, they can authorize the people primarily to do so. The difficulty is simply as to the right to impart the power to act. If it can be given to a selected few, it may also be delegated to all the inhabitants of a district, unless positively prohibited." Com. v. Quarter Sessions, 8 Pa. St. 391-395, 416. The right to delegate power to put in operation and carry out laws passed by the legislature being conceded, that the manner in which such right shall be exercised rests wholly in the legislature is thus stated by the supreme court of Illinois, in commenting upon the authority given to municipalities to pass ordinances: "It may be true that this authority is usually conferred upon a board of trustees or city council; but that does not affect the question, so far as a delegation of authority is concerned. This authority might as rightfully be conferred upon the mayor alone, or upon the voters of a city, as upon a common council. It is presumed that there is no constitutional provision determining upon how many, or upon how few, the legislature may confer the power. That must be left to legislative discretion." People v. Reynolds, 5 Gilman, 1-18. In the case of Currier v. Railway Co. 8 Blatchf. 487-493, the court says: "In all general laws for the creation of corporations, the individuals who associate to form the corporation are required to file, in a certain place, a certificate in a certain form, and unless that is done there can be no corporation; and yet it was never contended that the making of the creation of the corporation to depend upon the happening of such a future event, although lying wholly in the will of individuals, was a delegation of legislative power." In the case of People v. Salomon, 51 Ill. 37-55, the court say: "The power to enact laws necessarily includes the right in the law-making power to determine and prescribe the conditions upon which the law, in a given case, shall come into operation or be defeated; and this contingency may as

well be the result of the vote of the people of the locality to be affected by the law as any other." The reasons for sustaining the right of the legislature to delegate such power to individuals, as well as to incorporated municipalities or local bodies, are given by the supreme court of Mississippi in the following language: "And it would seem to be a proposition too clear for argument, that if the legislature have the right to enact the statute, and make it depend for coming into force upon the vote of a district or a portion of the people, that the power is not derived from the fact that the persons who are to vote upon the proposition are associated together as members of the same municipal body, or as inhabitants of some legal or constitutional subdivision of the territory. For in all cases of a corporation or a *quasi* corporation, the rights, privileges and powers of the corporators, or the body appointed to act for it, are conferred in the act creating such corporation. And no one will maintain that, by the passage of an act creating a corporation, the legislative power has been enlarged so as to authorize it to delegate an authority to such corporation which it was incompetent to confer in the first instance." *Alcorn v. Hamer*, 38 Miss. 652, 758, 759. The case of *Shumway v. Bennett*, 29 Mich. 451, cited by counsel for appellants, is the only case we have been able to find sustaining the position of appellants, that the power to fix the corporate boundaries of towns cannot be by the legislature delegated to individuals, but must be delegated to some public body possessing certain legislative powers. An examination of that case shows that, while several questions are discussed in the opinion, but one question is decided; and that is that "it is not in the power of a legislature to abdicate its functions or to subject citizens and their interests to the interference of any but lawful agencies; * * * that such legislative and local authority as can be delegated at all must be delegated to municipal corporations or local boards or officers,"—the court hold-

ing that "it is impossible to sustain a delegation of any sovereign power of government to private citizens, or to justify their assumption of it." Upon the theory that a delegation of sovereign power cannot be delegated to private citizens, the incorporation of a village under a statute very similar to our statute was held invalid.

We do not understand that the constitutionality of the provision of the statute submitting the question of incorporation to the resident voters within the limits of the proposed village was questioned, but that the objection goes to the power delegated to the petitioners, to the judge of the circuit court, and to the clerk of such court; and this objection is not based upon the assumption that the power delegated to these individuals cannot be delegated by the legislature to any one, but upon the holding of the court that such power, if delegated at all, must be delegated to some body recognized by the constitution as capable of receiving such authority, and having local jurisdiction over the territory to be incorporated. This decision is so at variance with the doctrine of the cases we have cited, and with the general current of authority upon this question, that it seems apparent that it must be based upon some constitutional provision relating to the delegation of such authority. While the opinion does not mention the provision of the constitution which relates to the delegation of such power, it is said therein that such power must be delegated to some body recognized *by the constitution* as capable of receiving such authority. It is also said, in the opinion, that such authority must be delegated to municipal corporations or local boards and officers. Section 38 of article 4 of the constitution of that state is as follows: "The legislature may confer upon organized townships, incorporated cities and villages, and upon the board of supervisors of the several counties, such powers of a local, legislative and administrative character as they may deem proper." By this provision of the constitution, bodies capable of

receiving such authority are recognized, and the bodies so recognized are the ones named in the opinion as the bodies to which such power must be delegated, if delegated at all. That the power to fix the boundaries of towns existed in the legislature is conceded by the court in that case, and the question whether such power could be delegated or not was not decided; but it was decided that, if such power could be delegated, it must be to some body recognized by the constitution as capable of receiving such delegated authority. Our constitution does not contain any provisions similar to the provisions of section 38 of article 4 of the Michigan constitution, and for that reason the case of *Shumway v. Bennett* is not an authority upon any question raised in this case. But, if it should be conceded to be an authority directly in point, we could not follow it. It is well settled in this state that the constitution is not a grant of power to the legislature, but that the legislature is invested with plenary power for all the purposes of civil government, and that the constitution is but a limitation upon that power. The power to confer upon the persons named in the general law for the incorporation of cities and towns authority to do certain acts therein specified, not being prohibited by the constitution, such law is not unconstitutional by reason of the delegation of such authority.

Appellants make the further objection that the incorporation of South Denver is invalid, for the reason that unoccupied and farming lands were included within the limits of the town; and contend that the words "the inhabitants of any part of any county," found in the general law for the incorporation of cities and towns, must, under the constitution, and by a reasonable and natural interpretation thereof, be held to mean the inhabitants of any unincorporated town, village, settlement or collection of houses; that, before any part of a county can be incorporated into a town, it must be inhabited as a village or town. We do not think the statute should be so construed. There is nothing in the language of the

statute to warrant such construction. Under the statute, it is the inhabitants of any part of a county not within the limits of any incorporated city or town that may be organized into a city or town. To hold that such part of a county cannot exceed the limits of, and must embrace, some village or larger collection of houses and inhabitants, would be judicial legislation. The Pennsylvania cases and the Missouri cases cited by appellants are not in point, for the reason that the statutes of those states expressly provide for the incorporation of existing towns and villages. The case of *Shumway v. Bennett* holds that the language is broad enough "to cover any kind of territory, unless modified by other provisions."

Counsel for appellants urge, as a further reason why the statute should not be so construed as to authorize farming and unoccupied lands to be included within the limits of a town incorporated thereunder, the fact that under a construction not limiting the territory that may be so incorporated to such part of a county as is thickly settled, and has some of the characteristics of a town, there would be no limitation as to territory that might be included within the limits of such corporation, and that such unlimited power is liable to abuse, by subjecting farming and unoccupied lands to an increased taxation, without any corresponding benefits. The statute is free from ambiguity, and means what it says, and says what it means, in words that admit of but one interpretation, and that interpretation will permit the including of farming and unoccupied lands within the limits of towns to be incorporated under the statute; therefore, the contention of appellants does not raise any question of interpretation or construction, but raises the question whether the courts can declare an act of the legislature invalid on the sole ground that it is repugnant to natural justice or expediency. The question so presented has been exhaustively treated by Mr. Sedgwick in his work on the Construction of Statutory and Constitutional Law, and by Judge Cooley in his work on Constitutional Lim-

itations, and the conclusion is reached that courts cannot so interfere with the action of the legislative branch of the government. The statement of his conclusions by Mr. Sedgwick, with a review of authorities in support of such conclusions, will be found on pages 154-159 of said work; and the following quotation from Cooley, Constitutional Limitations, 201, 202, presents the views of that learned author upon this question: "The rule of law upon this subject appears to be that, except when the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not, in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason and expedience with the law-making power."

We think the statute is free from all constitutional objection, and therefore our sole duty is to carry it into execution. We cannot pass upon its expediency or policy; those are questions upon which the legislature has passed, and its judgment cannot be reviewed by the courts.

The judgment should be affirmed.

We concur: DE FRANCE, C.; STALLCUP, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

Affirmed.

BUSH V. THE PEOPLE.

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| 22 | 506 |
1. While the owner of property may not commit a homicide for the purpose of protecting it against a trespasser, he is not bound to a passive submission which neither remonstrates nor resists.
 2. On indictment for homicide it appeared that defendant's brother was the owner of a parcel of ground upon which deceased had, without his knowledge or consent, erected a shanty, and of which he was holding possession. The owner, with others, entered upon the land for the purpose either of forcibly ejecting any person that might be in possession or removing the shanty without such person's consent, and in the controversy which followed deceased was killed by defendant. The jury were instructed, in substance, that if they should find that the defendant, in company with his brother, or soon after, entered upon the land in furtherance of the common design, and was aiding and advising him therein, and that he was aware at the time that the difficulty had arisen from such entry and design, then the killing would not be justifiable and the defendant should be found guilty. *Held* error.

Error to District Court of Chaffee County.

Messrs. WELLS, MACON and MCNEAL, for plaintiff in error.

ALVIN MARSH, Attorney-General, for defendants in error.

ELBERT, J. The plaintiff in error, James Bush, was indicted for the murder of Mortimer Arbuckle. Upon the first trial the jury disagreed; upon the second the accused was found guilty of voluntary manslaughter and sentenced to eight years' imprisonment in the penitentiary. The case is brought to this court by writ of error.

The homicide occurred on the 10th of March, 1879, about 8 o'clock in the morning, at Leadville, in the county of Lake. It appears from the evidence that a portion of the town site of Leadville had been theretofore entered as a placer claim by Stevens & Leiter, and that a patent had been issued to them therefor. This parcel of ground had been subdivided by the Leadville Improvement Com-

pany, grantee of Stevens & Leiter, into lots and blocks, and many of the lots had been sold and conveyed by that company to purchasers. William Bush, the brother of the accused, appears to have purchased from this company five of these lots for the sum of \$875 each. He had made a partial payment, and, under his agreement with the company, had possession and was to have a deed for the lots upon the payment of the balance of the purchase money. These lots were situated upon Harrison avenue, nearly opposite the Clarendon Hotel. They appear to have been occupied by a number of different tenants, all of whom, according to the testimony of William Bush, had entered into a written agreement to pay him rent and to vacate the premises upon demand. It appears that one of these lots (lot 9 of the old survey and lot 7 of the new survey) had been sold by William Bush to one Shute for the sum of \$3,000, payable in sixty days; that Bush had caused a deed of said lot to be made by the Leadville Improvement Company direct to Shute, and had placed the same in escrow in the Bank of Leadville to be delivered to Shute upon compliance with the conditions of the escrow. Bush testifies that he caused the deed thus to be made direct to Shute instead of himself in order to save the expense of making and recording two deeds, and also that he was to hold possession until he was paid. There appears to have been a cabin situated, in whole or in part, upon the back part of this lot, occupied by a tin shop, also a shed or lean-to, as it is called by the witnesses, which was hired and used by one Boettcher as a place of storage. It was upon this lot, so sold by William Bush to Shute, that the homicide took place.

Prior to the date of the homicide, questions appear to have arisen touching the validity of the Stevens & Leiter title, and many persons, believing, or being advised, that the Stevens & Leiter entry would or might be canceled, and that actual occupants of lots in that event would be-

come entitled thereto, engaged in what is called by the witnesses "lot jumping." This gave rise to more or less excitement in the community, to frequent disputes, and to occasional personal rencounters between those claiming title to the lots from Stevens & Leiter and persons seeking to occupy. Out of this condition of things grew the trouble which resulted in the killing of Mortimer Arbuckle by the defendant, James Bush. It appears that on the morning of the day of the homicide, and between the hours of 3 and 6, the deceased and one Hopewell, acting upon the advice of their attorney, Forhan, who, it appears, was to have an interest with them in the lot, taking with them one Sprague, a carpenter, entered upon the lot and erected thereon a board "cabin," as it is called, about eight feet by ten in size, and also put up on the front of the lot a temporary board fence. This was done by the deceased and Hopewell, with a view to acquiring title to the lot, the arrangement being that their attorney was to occupy the cabin which they had so erected as an office. Having completed their cabin between 5 and 6 o'clock in the morning, they left for the purpose of getting their breakfast. What occurred thereafter is thus told by the witness Hopewell:

"Then Sprague, Arbuckle and myself came to Harrison avenue, and to where we erected this cabin, went into the cabin, took out some tools, took them down to Heller's cigar store; Sprague went to his work, and Arbuckle and I walked up Harrison avenue north, on the west side of the street, past this cabin; half a block past it, or maybe further, we passed some men coming down on the west side of Harrison avenue, going south. We turned and followed them down; they turned then and crossed the street to where this cabin that we had erected was, and one of them knocked down a little board fence we put up in front of it, and one of them, a Mr. Shute, got a prop, and was going to throw the cabin off. Arbuckle asked him what he was going to do, and he

said he was going to throw the cabin off, or to that effect, and Arbuckle asked him what right he had; he said it was his lot; Arbuckle said if he owned the lot and had got a deed or title that he would take the cabin off himself. Then there was some talk about it; Shute stated that he had deeds for the lot in the bank. I stated, also, that if he had title deeds we would take it off. Then Shute appeared to be satisfied, throwed down the pole, and walked around toward the new building, Boettcher's hardware store, on the southerly side; then William Bush stepped towards Arbuckle, and called him a 'lot-jumping s—n of a b—h,' or a 'damned lot-jumper,' or some words like that; had his hands up as if he was going to fight, and Arbuckle threw up his hands and said something like he could not call him a s—n of a b—h. I was standing a little to the right of Arbuckle, and I said, 'Here, none of this,' and put my hands out to sort of separate them, when James Bush, who was standing a little back of William Bush, and I think a little to the west of him, fired the shot that killed Arbuckle. I saw the pistol; the next instant Arbuckle fell over. I saw James Bush level the pistol at Arbuckle; it was done in almost an instant. I recollect distinctly the pistol leveled in his hand and shot fired; Arbuckle fell over backwards. He and Bill Bush were three or four feet apart; Jim Bush was eight or ten feet back of Bill. We could all see one another, as we were standing close together; Arbuckle was on my left, Bill in front of him, Jim Bush diagonally in front of him, facing him. Jim Bush hadn't said anything at that time, that I heard, nor had anything occurred to call Arbuckle's attention to Jim Bush at the time. Arbuckle, I think, was looking at William Bush; his hands were up in a fighting position; both he and Bush were in a position to fight. William Bush seemed to be looking straight at Arbuckle. There were some other men there; don't remember who they were; think there were five men in the party with Bush

and Shute. Nobody there represented the lot except Arbuckle and myself; don't think I had made any other remark than what I have stated. After Shute had thrown down his pry there was some conversation which I don't remember; I don't think it was over five or ten seconds from the time Bush and Arbuckle started the conversation until the shot was fired. The words were scarcely spoken, the men were right in position as if they were going to fight, when the shot was fired; think this was about 8 o'clock in the morning. Arbuckle fell with his head toward the corner of the cabin, the southeast corner; he fell over on his back, with his face thrown up; the blood spurted two or three inches high from the wound. There were some pieces of board lying there belonging to the new building which they were putting up; don't remember how the arms and hands of the deceased lay; didn't notice anything particular about them. I was confused, I think. After that I went off down Harrison avenue. When he fell over towards the corner of the cabin, I stooped down and touched his head; there was a sort of gasp; I got up and left, and went down Harrison avenue to see about having Bush arrested and to get a doctor. * * * He (Arbuckle) didn't carry any weapons. He owned a pistol; we left it in the cabin down on Sixth street. I particularly remember this matter, because we had an understanding with Forhan, the lawyer. He had no weapon upon him that I know of; he could not have had. I had last seen Arbuckle's pistol the day before, hanging up in the kitchen. He had a small pocket-knife; the pistol was at the cabin after that; don't remember what became of it. * * * I might have heard Mr. Bush use that word, or something like it; he was addressing Arbuckle, and my own impression was, and my remembrance of it is, he called him a 'damned lot-jumping s—n of a b—h,' or words to that effect. Then it was that Arbuckle made a motion as if he would strike Bush; don't remember whether

there was any blow struck or not; know that Arbuckle and Bush were both in fighting position; that Arbuckle drew back at the instant, as if he was going to hit Bush or Bush him; whether the blow was struck I don't remember; I don't think it was, though. When Bush raised his hands as though he would strike Arbuckle, Arbuckle did not step back and draw his hand back this way towards his right hip-pocket; no, I think not; my impression is both men were going for one another, stepping forward. I was standing quite close to him at the time those remarks were made; I was not over three feet from him. I didn't see Arbuckle step back and put his hand towards his hip-pocket; I will swear that he didn't do it to the best of my recollection and belief. I don't know how his hands were when he fell; I didn't, as soon as Arbuckle fell, take his hand from under him and draw something out of his hand, or out of his pocket, and put it in my coat pocket; I am positive of that. I didn't have a hammer in my hand at the time of the shooting; didn't stand by the side of Arbuckle with the hammer raised in a striking attitude."

There is no material conflict of testimony except as to what the deceased and Hopewell, just prior to the homicide, said and did.

William Bush testifies: "On the morning of the 10th of March, when I got opposite to the Clarendon Hotel, I noticed that during the night there had been a small shanty built on this lot that I owned, and I walked up the street to about Fifth street, and met Mr. Shute coming down to tell me about somebody having jumped the lot during the night, and we walked on together, and he kicked off a board from a kind of fence that had been built in front of it; the fence had been built on posts which we had on the ground before. He kicked the top board off, and stepped over on the lot. We talked about two or three seconds, and he kicked off another board, and picked up a piece of 2x4 or something of that kind

and started to the back of the shanty, and just at that time a man, whom I afterwards knew as Arbuckle, asked him what he was going to do, and he said: 'I am going to tear this down.' Arbuckle said: 'No s—n of a b—h can tear that building down and live. If you will show me your title to this I will move it off myself.' Shute said: 'Come with me down to the bank, or down to the recorder's office, and I will show you the title;' and he said: 'I won't go.' I said: 'If you will go with me to the bank where I can see my deeds I will show you all the titles, the original papers, and the title from the government.' He said: 'I won't go; you show it to me.' I said: 'Do you think I carry a deed around in my pocket to show to every s—n of a b—h of a lot-jumper in Leadville?' and when I said that he jumped up and struck me. I put up my left hand and caught the blow, and jumped back, and he put his hand on his hip-pocket, and at the same moment Hopewell stepped forward, with a hammer in his hand, like this, and at that moment a shot was fired and he fell. I saw Mr. Sullivan just before this controversy ended, going over, and he stopped at this lot, and came to the corner, and stopped there. I was about four feet from Arbuckle when the shot was fired; about the same distance from Hopewell at the time he stepped forward, and Arbuckle back, about four feet; Shute went in my company to that lot; nobody else directly in company with us; there were others came afterwards. Before the first board had been kicked down, and we had stepped into the lot and turned around, I saw several persons a very short distance from us. From the time Shute was first addressed by Arbuckle until the shooting I don't think over thirty seconds elapsed at the outside; the conversation was very rapid—a great deal quicker than I can tell it. I didn't see James Bush until after the shooting; I didn't know that he was there. When Shute and Arbuckle fell I thought both of them were killed. While I and Arbuckle were sparring, Shute

was standing to my left, and I really don't know what he was doing; I know he fell down. I don't of my own knowledge know where James Bush stood when the shot was fired; I didn't see him on the lot; I saw him right out here on the sidewalk; I cannot tell where the shot came from, except what I found out since that; the shot seemed to come from the left side of me. I was in such a position that I am able now to say that the shot did not come from the northeast corner of the lot; I know it didn't; I was looking directly northeast. The shot took effect in the man's left cheek. [Gives position of parties.] When he put his hands behind him the body moved this way, and at that instant the shot was fired; he fell at once; he fell on his back, on his right side, with his hand under him. My recollection is that Hopewell, Roberts and Joy had hold of the body about the same time; don't think that either of them were three seconds ahead of the other; I saw Hopewell stoop down and take the hand of the dead man out of his pocket, and I saw what appeared to be a knife; I saw the jaws of it about an inch and a half out of his hand; it was a large knife; it looked like brass; I got a kind of glimmer of something bright; Hopewell put it in his pocket and walked off; he didn't stay there two seconds after that." Both the witnesses, Hopewell and William Bush, are corroborated in most respects by a number of witnesses in their respective accounts of what was said and done at the time of the homicide. The testimony is very voluminous, extending over one thousand three hundred folios; there is no occasion for reviewing it *in extenso*. The extracts which we have given sufficiently show the case sought to be made by the prosecution, the case sought to be made by the defense, and the material points on which the testimony conflicted. The assignments of error principally relied upon are to the second and sixth instructions given by the court. We notice them in their order.

Exception is taken to the last paragraph contained in

the second instruction. The instruction is as follows: "If William H. Bush was assaulted by the deceased and another, and the circumstances were such as to induce in the mind of defendant a reasonable and well-grounded belief that his brother was at that time actually in danger of losing his life, or suffering great bodily harm at the hands of deceased, or deceased and another, then defendant was justified in defending his brother, even to the extent of taking his life, whether the danger was real or apparent; and if defendant really acted under the influence of such fears, and not in a spirit of revenge, you will find him not guilty; *but, if you believe beyond a reasonable doubt from the evidence that defendant, by his presence or otherwise, was aiding or advising his brother in the commission of the act which resulted in the affray, and defendant was at the time aware that such difficulty had arisen by reason of the acts which he had so aided and advised, then his act in killing the deceased was not justifiable.*" The portion of the instruction excepted to is italicized.

One's right of self-defense may be abridged or impaired by his own wrongful act, and the court doubtless had this in view when it gave both the second and sixth instructions. Section 721, General Statutes, provides: "If a person kills another in self-defense it must appear that the danger was so urging and pressing that in order to save his own life or to prevent his receiving great bodily harm the killing of the other was absolutely necessary. *And it must appear also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow is given.*" This section is but a re-enactment of a common-law rule, and the reasons upon which it is founded are variously stated. Sergeant Hawkins says: "Neither shall a man, in any case, justify the killing of another by the pretense of necessity, unless he were himself wholly without fault in bringing the necessity

upon himself. If a man, in defense of an injury done by himself, kill any person whatsoever, he is guilty of manslaughter at least." 1 Hawk. P. C. c. 28.

In *Stoffer v. State*, 15 Ohio St. 47, it is said: "While he who made the first assault remains in the conflict, to whatever extremity he may be reduced, he cannot be excused for taking the life of his antagonist to save his own. In such case it may be rightfully and truthfully said that he brought the necessity upon himself by his own criminal conduct." In the case of *Rippy v. State*, 2 Head, 217, it is said: "Real or apparent necessity, brought about by the design, contrivance or fault of the defendant, is no excuse." In the case of *Adams v. State*, 47 Ill. 376, the principle is stated thus: "The defendant cannot avail himself of necessary self-defense if the necessity for that defense was brought on by the deliberate, lawless act of the defendant in bantering Bostick to fight for the purpose of taking his life, or committing a deadly harm upon him, and in which he killed Bostick by the use of a deadly weapon." In the case of *State v. Neeley*, 20 Iowa, 108, the court say: "What we mean is that if the prisoner, with a loaded weapon, sought the deceased with a view of provoking a difficulty, and with the intent of having an affray, and a difficulty did ensue, he cannot, without some proof of a change of conduct or action, excuse the homicide on the ground that the deceased fired the first shot." In the case of *State v. Linney*, 52 Mo. 40, we find the rule stated in a case where a father had interfered in behalf of his son: "A party who seeks a difficulty cannot avail himself of the doctrine of self-defense, nor in such case would the father be justified in killing the adversary of his son, provided the son had provoked or brought on the conflict in which the son was so placed in imminent danger during the progress thereof; provided, always, that the father knew that his son had sought or brought on the difficulty." See, also, Whart. Hom. § 432, and cases cited; Horr. & T. Cas. 220, and cases cited.

Where a known felony is attempted upon a person, the party assaulted may repel force by force, and any other person present may interpose for preventing mischief, and if death ensue the party so interposing will be justified. The right thus to assist applies with peculiar force where a relationship exists, such as father, son, brother or husband. 2 Whart. Crim. Law, 975; Whart. Hom. § 532; 1 Bish. Crim. Law, § 872. It will be seen, however, by the doctrine of the case last cited, that the rights of one interfering are affected by the principle which we have quoted, if he knew that the party in whose behalf he interposed was the assailant.

Regarding the foregoing principle as applicable, it is to be supposed the court below gave the second and sixth instructions. The question is presented: Was William Bush in the position of one who had brought on an affray by his own unlawful act, and had thereby lost, both for himself and the accused interfering in his behalf, the right to interpose as a defense the plea that the killing was necessary in order to protect his life? The court, in the second instruction, speaks of William Bush as having committed an "act which resulted in the affray," and there is a contention as to what act the court here alludes. William Bush, in his testimony, says: "I think I did testify that way; I went there to throw that building off that was built in the night, regardless of who put it up, and who was there. * * * I expect I would have put it off; there was nobody in possession there, but I think I did intend to use physical force if necessary; I suppose if I had been interfered with I might have had a fight; I went there, probably, to get my rights — to have a fight if one should come; I was not any more prepared for it than I am now — my hands and fists; that is all I ever use. * * * I didn't know who was there; I didn't care; I was going to get what belonged to me — the lot; I was going to throw the cabin off; if any one had resisted me, I suppose I would have tried to throw it off anyway."

Whatever may have been William Bush's intention, it does not appear, as a matter of fact, that after arriving on the lot he did use any physical force for the purpose of removing the cabin. The temporary fence which deceased and Hopewell had erected was kicked down by Shute; I find no evidence that ascribes this act to William Bush. It was also Shute who picked up the handspike or piece of scantling, and approached the cabin with the purpose of throwing it over. From this purpose, however, Shute desisted as soon as the deceased told him that if he, Shute, had the title, he, the deceased, would remove the cabin himself. Thereupon Shute threw down the handspike and walked off some little distance to the south. This was the extent of the force used looking to the removal of the cabin and fence erected by the deceased from the lot, and these acts were exclusively the acts of Shute. While William Bush was present, and without doubt in full sympathy with Shute, he appears to have confined himself to talking. At this point the controversy seemed to be in a fair way for amicable adjustment. Its renewal seems to have been due to the insulting epithet applied by Bush to the deceased, who thereupon, saying that no one could call him *that*, or words to that effect, threw himself into a fighting attitude with his fists up, and, according to some of the witnesses, struck at Bush. Bush returned the blow, and it is claimed by the defense that at this time the deceased stepped back and put his hand in his hip-pocket, or drew it back towards his hip-pocket, as if to draw a pistol or knife. Thereupon, claiming that he believed his brother's life was in danger, James Bush, the accused, fired the shot which killed the deceased.

William Bush had entered upon the lot with the intention, as he says, of protecting his rights, and of removing the cabin therefrom. It is reasonably clear that this was the act to which the court alluded in the second instruction. Aside from entering upon the lot, William

Bush, as we have seen, had used no physical force in removing the cabin and fence. His insulting language to the deceased cannot properly be denominated an act, nor was it an assault. There is testimony to the effect that when William Bush applied to the deceased the insulting epithet mentioned "he had his hands up as if he was going to fight," but upon this point the testimony was conflicting, and, as a fact, it was controverted. It is not, therefore, to be supposed that the court referred to this act as "the act which resulted in the affray." It would have been error to have done so. I think the court intended by the language used the act which is clearly pointed out and designated in the sixth instruction, namely, the act of entering upon the lot "for the purpose of forcibly ejecting any person that might be in possession thereof, or, without the consent of such person, removing the shanty erected the night preceding." If this be not true, then the instruction was inapplicable to any fact in evidence. If this view be correct, then the two instructions present substantially the same proposition, and must share the same fate. In this view, and as no doubt exists as to what the court intended to say, and does say, in the sixth instruction, we address ourselves to the consideration of its correctness. The instruction is as follows: "If you believe beyond a reasonable doubt from the evidence that defendant, in company with his brother, went upon the lot for the purpose of forcibly ejecting any person that might be in possession thereof, or, without the consent of such person, removing the shanty erected the night preceding, or if defendant did not go upon the lot in company with his brother, but, for the purpose of aiding in said common design, came around said lot within a short time after his brother and others, and, while he was so upon the lot for the purpose aforesaid, William H. Bush and the deceased came to blows, or were about to engage in a fight, and thereupon defendant shot and killed deceased, you will find him guilty."

This instruction contains two distinct propositions; the first relates to the entry upon the lot for the purpose of forcibly ejecting any person that might be in possession thereof, and the second relates to the entry upon the lot *for the purpose of removing the shanty erected thereon the night preceding, without the consent of the persons who erected it.* As the second proposition is the one most strenuously questioned, it will be first considered. It is well settled that a bare trespass against the property of another is not sufficient provocation to warrant the owner in using a deadly weapon in its defense, and if he do so, and with it kill the trespasser, it will be murder, and this though the killing were actually necessary to prevent the trespass. 2 Whart. Crim. Law, § 975, and cases cited. The rule is the same whether the trespass be upon real or personal property; the law does not justify the shedding of human blood to prevent slight injuries to the property of others. Russ. Crimes, 520; Arch. Crim. Pr. § 308; *State v. Zellers*, 7 N. J. Law, 220; *State v. Drew*, 4 Mass. 395; *State v. Kennard*, 8 Pick. 133; *State v. Morgan*, 3 Ired. 186; *Oliver v. State*, 17 Ala. 598.

It is clear that the homicide in this case cannot be justified on the ground that the deceased was a trespasser. Had the deceased been the owner of the lot upon which the homicide took place, and William Bush and the accused mere naked trespassers, it is equally clear that the deceased would not have been justified in taking their lives, or in assaulting either of them with that intent. In this connection, so far as we can see from the testimony, Bush was the equitable owner of the lot, had purchased it from the legal owner, and had been put in possession, and retained possession through tenants who paid him rents.

“The general doctrine is, that while a man may use all reasonable and necessary force to defend his real and personal estate, of which he is in the actual possession, against another who comes to dispossess him without

right, he cannot instantly carry his defense to the extent of killing the aggressor. If no other way is open, he must yield, and get himself righted by resort to the law."

1 Bish. Crim. Law, § 857, and cases cited. See, also, § 536, and cases cited.

"An assault and battery may be justified as inflicted in defense of one's property. Yet, consistent with this proposition is another, that one in the defense of his property should not resort to means reasonably calculated to endanger life." 1 Bish. Crim. Law, § 361, and cases cited. The doctrine is well stated in the case of *State v. Morgan*, 3 Ired. 188: "You may not kill because you cannot otherwise effect your object, although the object sought to be effected is right. * * * The purpose is, indeed, rightful, but it is not one of such paramount necessity as to justify a resort to such desperate means. So it is clear that if one man deliberately kills another to prevent trespass upon his property, whether that trespass could or could not otherwise have been prevented, he is guilty of murder. *If, indeed, he had used moderate force, and this had been returned with such violence that his own life was in danger, and then he killed from necessity, it would have been excusable homicide, not because he can take life to save his property, but he might take the life of his assailant to save his own.*"

From the authorities which we have cited it is clear that while the owner of property may not commit a homicide for the purpose of protecting it against a trespasser, he is not bound to a passive submission, which neither remonstrates nor resists. Under the condition of title as stated by Bush, both he, and Shute at his request, had a right to go to the lot and to enter upon it for the purpose of removing therefrom both the cabin and the fence erected by the deceased and Hopewell. To what extent they or either of them, if resisted, might have used force it is not necessary to say. The deceased and Hopewell appear to have arrived immediately after

Bush and Shute went upon the lot. Whatever the intention of William Bush, he stopped short of any act of physical force towards the removal of either cabin or fence, while Shute, if he is to be regarded as acting under the orders of William Bush, desisted from further acts, upon assurance from deceased that he would remove the cabin if he, Shute, had title. Had William Bush gone to the lot for the purpose of removing the shanty, with the ulterior purpose of thereby bringing on an affray with the intention of taking the life of the deceased, and after arriving at the lot had acted in pursuance of said purpose, and the accused, James Bush, had been present, aiding and abetting him in this felonious purpose, a different question would have been presented. This, however, was not the case presented by the evidence; nor is the instruction we are considering based upon the existence of any such intention upon the part of William Bush. On the other hand, the court tells the jury, broadly and without qualification, in substance, that if they should find that William Bush went upon the lot for the *purpose of removing the shanty erected by the deceased and Hopewell, without their consent, and that the accused, James Bush, was aiding and abetting in that design, they must find him guilty.* This certainly was error. It is not the law that the owner of real property, in possession through his tenants, may not go to it, and upon it, for the purpose of remonstrating with a trespasser thereon, and for the further purpose of removing therefrom structures erected upon it by a trespasser, without thereby, and without more, losing the right of defending himself if the trespasser make a murderous assault upon him. If the act of William Bush in this respect was lawful, it was lawful for the accused, James Bush, to aid therein. In this respect the jury were not correctly advised of the law. We do not say that the evidence shows that a murderous assault was committed upon William Bush, his brother, which justified the kill-

ing of the deceased by the accused. This was the defense which the accused interposed. There was some evidence in support of it, and the question of his guilt or innocence upon the defense made should have been submitted to the jury upon proper instructions.

Whether the accused, James Bush, had reasonable ground to believe his brother's life was in danger, or that he was about to suffer great bodily harm at the hands of the deceased, and whether he really acted under the influence of such fears, and not in the spirit of revenge, were the principal questions presented, upon the determination of which depended the guilt or innocence of the accused. I think that these questions were fairly and correctly submitted to the jury in the first part of the second instruction, and it is to be regretted that the concluding paragraph of the instruction, as well as the sixth instruction, practically deprived the prisoner of his rights under the law as stated, and left the jury at liberty to find him guilty upon another and entirely erroneous proposition.

The judgment of the court below is reversed and the cause remanded for a new trial.

HELM, J., did not sit in this case.

Reversed.

10	582
12	531
10	582
13	115
13	119
13	120
13	132
10	582
16	314
10	582
17	143
17	148
17	454
10	582
18	308
1a	489
10	582
3a	553
10	582
21	196
22	197
22	455
28	522
10	582
8a	255

WHEELER V. THE NORTHERN COLORADO IRRIGATION CO.

1. The alternative writ of *mandamus* must state a cause of action, and its sufficiency in this regard may be tested by answer, as upon demurrer.
2. By the constitution, title to the unappropriated waters of the state is vested in the public, with a perpetual right to its use in the people.
3. A priority of right to this use for beneficial purposes is, with certain limitations, acquired by priority of appropriation.
4. After appropriation, except perhaps as to the quantity actually flowing in the consumer's ditch or lateral, the title remains in the public, with the paramount right of user, unless forfeited, in the appropriator.

10	582
25	214
25	259
10	582
556	
582	
229	

5. To constitute a valid appropriation the water diverted must within reasonable time be applied to some beneficial use. But the priority of an appropriation may date, proper diligence having been exercised, from the commencement of the ditch.
6. The carrier acquires certain rights in connection with the water diverted, but it does not become a *proprietor* thereof.
7. It is a *quasi*-public servant, charged with certain duties, and subjected to a reasonable control. It has, in general, a monopoly of the business, and, at common law, could not coerce compliance with unreasonable regulations or charges.
8. But the constitution provides for a tribunal to fix the maximum rate, in case of disagreement, and forbids the enforcement of unreasonable demands in relation to the time and conditions of payment.
9. The carrier is entitled to compensation for carriage, but it cannot charge for the *right to use water* from its canal. Nor can it exact in advance a part or all of its transportation charge, for the remaining years of its corporate life, as a condition precedent to use for the current irrigating season.
10. Under the constitution the county commissioners can only be authorized to establish the maximum *amount* of the rate. They cannot be empowered to dictate the exact rate that shall be collected, or to fix the *time* or *conditions* of payment. The time and conditions of payment are proper subjects for legislation.
11. Prior to 1887 the statute did not authorize the county commissioners of a given county to establish a maximum rate if the head of the canal was located in another county.
12. The consumer's rights may be waived, and a voluntary contract as to these matters may be binding upon him.
13. Section 311 of the General Statutes is not repealed, and it commands the carrier, having water undisposed of, to furnish it, upon payment of the established rate, to the class of persons using it, in the manner named by the articles of incorporation. If the carrier has a rate of its own with which the consumer is satisfied, he is not required to apply to the commissioners to fix a maximum rate.
14. Upon tender of the rate fixed and compliance with reasonable regulations established, if the carrier has water undisposed of, the consumer is entitled to its use. And *mandamus* lies where his demand is refused.
15. The alternative writ of *mandamus* cannot be amended by substituting therein a new cause of action.

Appeal from District Court, Arapahoe County.

APPELLANT, as relator, instituted *mandamus* proceedings in the court below to compel the respondent company to

furnish him water for irrigation. Respondent demurred to the alternative writ; the demurrer was sustained and judgment entered in its favor. From this judgment the present appeal was taken.

The following constitutional and statutory provisions are considered or referred to in the opinion:

CONSTITUTION, ART. XVI.

SEC. 5. The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

SEC. 6. The right to divert unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes.

SEC. 7. All persons and corporations shall have the right of way across public, private and corporate lands for the construction of ditches, canals and flumes, for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes and for drainage, upon payment of just compensation.

SEC. 8. The general assembly shall provide by law that the board of county commissioners, in their respective counties, shall have the power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations.

GENERAL STATUTES.

SEC. 311. Any company constructing a ditch under the provisions of this act shall furnish water to the class of persons using the water in the way named in the certificate, in the way the water is designed to be used, whether miners, mill men, farmers, or for domestic use, whenever they shall have water in their ditch unsold, and shall at all times give the preference to use of the water in said ditch to the class named in the certificate; the rates at which water shall be furnished to be fixed by the county commissioners as soon as such ditch shall be completed and prepared to furnish water.

SEC. 1740. Any person or persons, acting jointly or severally, who shall have purchased and used water for irrigation of lands occupied by him, her or them, from any ditch or reservoir, and shall not have ceased to do so for the purpose or with the intent to procure water from some other source of supply, shall have a right to continue to purchase water to the same amount for his, her or their lands, on paying or tendering the price thereof fixed by the county commissioners as above provided, or, if no price shall have been fixed by them, the price at which the owners of such ditch or reservoir may be then selling water or did sell water during the then last preceding year. This section shall not apply to the case of those who may have taken water as stockholders or shareholders after they shall have sold or forfeited their shares of stock, unless they shall have retained a right to procure such water by contract, agreement or understanding, and use between themselves and the owners of such ditch, and not then to the injury of other purchasers of water from or shareholders in (the) same ditch.

Messrs. L. C. ROCKWELL C. W. WRIGHT and WILBUR F. STONE, for appellants.

Messrs. HUGH BUTLER, A. B. MCKINLY and T. D. W. YONLEY, for appellees.

HELM, J. The alternative writ of *mandamus* performs the office of the complaint in an ordinary civil action. It must state a cause of action, and failing to do so will not support a judgment. Its legal sufficiency may, by the return or answer provided for in the Civil Code, be challenged as upon demurrer and tested under the rules of pleading applicable to the ordinary complaint, when assailed by demurrer.

The alternative writ before us is somewhat informal and undoubtedly contains unnecessary matter; but, so far as mere form is concerned, we shall hold it sufficient without discussion, and proceed to consider the alleged substantial legal objections that are fairly presented by respondent's demurrer.

✓ The subject of water rights has always been justly regarded as one of the most important dealt with in the legislation and jurisprudence of Colorado. Hitherto attention has been mainly directed to the adjustment of priorities and differences between individual consumers; but hereafter, owing to the rapid settlement of the eastern part of the state, the *status* of the carrier and its relations with the consumer will command the most earnest and thoughtful consideration.

For convenience I shall, throughout this opinion, use the terms "carrier" and "consumer," meaning the canal company and the tiller of the soil respectively.

✓ The agriculturists in the territory mentioned are, with few exceptions, unable to convey water from the natural streams to their land. The annual rainfall is increasing; yet at present, without irrigation, but a small fraction of the producing capacity of the soil can be utilized, and, unaided, these consumers will for years to come be practically helpless. To the successful cultivation of that region the carrier and consumer are, therefore, equally indispensable. Hence a wise legislative policy and an intelligent judicial construction require a careful consideration of the privileges, powers and duties of the car-

rier, as well as the rights and obligations of the consumer. The courts should protect the consumer in the full enjoyment of his constitutional and statutory rights; but they should also jealously guard the rights of the carrier; and so deal with it (the constitution and statutes permitting) as to encourage the investment of capital in the construction of reservoirs and canals for the storage and transportation of water.

The pleadings in the case at bar show that respondent is a carrier and distributor of water for irrigation and other purposes. That its canal, two years ago, was upwards of sixty miles in length and capable of supplying water to irrigate a large area of land. That relator is one of the land owners and consumers under the canal, and can obtain water from no other source; also, that respondent has, undisposed, a sufficient quantity to supply his wants. That he tendered the sum of \$1.50 per acre, the annual rental fixed by respondent, and demanded the use of water for the current season, but declined to pay the further sum of \$10 per acre also demanded, and to sign a certain contract presented to him for execution. That respondent refused, and still refuses, to grant relator's request, except upon compliance with these conditions. The remaining essential facts will sufficiently appear in connection with the specific questions of law presented, as they are in their proper order discussed.

Does the record show a clear legal right of relator, from the enjoyment of which he is unlawfully precluded by respondent?

Our constitution dedicates all unappropriated water in the natural streams of the state "to the use of the people," the ownership thereof being vested in "the public." The same instrument guaranties in the strongest terms the right of diversion and appropriation for beneficial uses. With certain qualifications it recognizes and protects a prior right of user, acquired through priority of appropriation. We shall presently see that after appro-

priation the title to this water, save, perhaps, as to the limited quantity that may be actually flowing in the consumer's ditch or lateral, remains in the general public, while the paramount right to its use, unless forfeited, continues in the appropriator. But to constitute a legal appropriation, the water diverted must be applied within a reasonable time to some beneficial use. That is to say, the diversion ripens into a valid appropriation only when the water is utilized by the consumer; though the priority of such appropriation may date, proper diligence having been used, from the commencement of the canal or ditch.

The constitution unquestionably contemplates and sanctions the business of transporting water for hire from natural streams to distant consumers. The Colorado doctrines of ownership and appropriation (as declared in the constitution, statutes and decisions) necessarily give the carrier of water an exceptional *status*; a *status* differing, in some particulars, from that of the ordinary common carrier. Certain peculiar rights are acquired in connection with the water diverted. It is unnecessary now, however, to enumerate these rights in detail. For the present it suffices to say that they are dependent, for their birth and continued existence, upon the use made by the consumer.

But giving these rights all due significance, I cannot consent to the proposition that the carrier becomes a "proprietor" of the water diverted.

A cursory reading of the statutes might convey the impression that the legislature regarded the carrier as possessing a salable interest in this water. And the constitutional phrase, "to be charged for the use of water," relating to the carrier's compensation, might at first glance seem to recognize a like ownership in such use. But construing all the provisions of that instrument bearing upon the subject *in pari materia*, the correctness of both of these inferences must be denied. The

constitutional convention was legislating with reference to the necessities and practical wants of the people. And this body, in its wisdom, ordained that the ownership of water should remain in the public, with a perpetual right to its use, free of charge, in the people.

By section 8, article XVI, of the constitution, from which the foregoing phrase is taken, the convention recognized the carrier's right to compensation for transporting water, and provided for a judicial, or *quasi*-judicial, tribunal to fix an equitable maximum charge where the parties fail to agree. It requires no citation of authority to show that the words "purchase" and "sale," together with other words of like import, used in this connection by the legislature, must receive a corresponding interpretation. Under the constitution, as I understand it, the carrier is at least a *quasi*-public servant or agent. It is not the attitude of a private individual contracting for the sale or use of his private property. It exists largely for the benefit of others; being engaged in the business of transporting, for hire, water owned by the public, to the people owning the right to its use. It is permitted to acquire certain rights as against those subsequently diverting water from the same natural stream. It may exercise the power of eminent domain. Its business is affirmatively sanctioned, and its profits or emoluments are fairly guarantied. But in consideration of this express recognition, together with the privileges and protection thus given, it is, for the public good, charged with certain duties and subjected to a reasonable control.

Were the constitution and statutes absolutely silent as to the amount of the charge for transportation, and the time and manner of its collection, there would be strong legal ground for the position that the demand in these respects must be reasonable. The carrier voluntarily engages in the enterprise; it has, in most instances, from the nature of things, a monopoly of the business along the line of its canal; its vocation, together with the use

of its property, are closely allied to the public interest; its conduct in connection therewith materially affects the community at large; it is, I think, charged with what the decisions term a public duty or trust. In the absence of legislation on the subject, it would, for these reasons, be held, at common law, to have submitted itself to a reasonable judicial control, invoked and exercised for the common good, in the matter of regulations and charges. And an attempt to use its monopoly for the purpose of coercing compliance with unreasonable and exorbitant demands would lay the foundation for judicial interference. *Munn v. People*, 4 Otto, 113, and cases cited; *Price v. Riverside L. L. Co.* 56 Cal. 431; *C. & N. W. R. R. Co. v. People*, 56 Ill. 365; *Vincent v. Chicago & Alton R. R. Co.* 49 Ill. 33.

But the constitution is not silent in the particular mentioned. It evinces, beyond question, a purpose to subject this, as other branches of the business, to a certain degree of public control. As we have seen, it provides for a tribunal to which the maximum amount of water rates may be referred, in case of dispute between the carrier and consumer. And I think that, by fair implication, it forbids the carrier's enforcement of unreasonable and oppressive demands in relation to the time and manner of collecting these rates. Any other view would accuse the convention of but partially doing its work. For the fixing of maximum rates would be protection, grossly inadequate, if either of the parties might dictate, absolutely, the time and conditions of payment. The primary objects were to encourage and protect the beneficial use of water; and while recognizing the carrier's right to reasonable compensation for its carriage, collectible in a reasonable manner, the constitution also unequivocally asserts the consumer's right to its use, upon payment of such compensation.

Any unreasonable regulations or demands that operate to withhold or prevent the exercise of this constitutional

right by the consumer must be held illegal, even though there be no express legislative declaration on the subject.

The contract which respondent required relator to sign and agree to comply with, as a condition precedent to the granting of his request, contains the following among other conditions: That he buy in advance "the right to receive and use water" from its canal, paying therefor the sum of \$10 per acre; also that he further pay "annually in advance, on or before the 1st day in May of each year, such reasonable rental per annum, not less than \$1.50 nor more than \$4 per acre, as may be established from year to year" by respondent. If we hold respondent to the literal term used in this contract we must declare the \$10 exaction illegal. Respondent cannot collect of relator the sum of \$10, or any other sum, for the privilege of exercising his constitutional right to use water. ✓

But counsel contend in argument that the foregoing expressions, quoted from respondent's contract, are not intended to require the payment of \$10 per acre for a *right to use water*. They say this \$10 is merely a portion of the annual "rental" exacted of consumers in advance for the remaining years of respondent's corporate existence; that instead of requiring, say, \$2.50 per acre for each irrigating season in turn, respondent has seen fit to divide this sum into two parts, collecting \$1.50 annually, and the residue of \$1 each for the remaining ten years of its corporate life, as one entire sum in advance.

This construction of the contract may, under all the circumstances, seem plausible, though I doubt if the courts could accept it; but if accepted the difficulty under which respondent labors would not be obviated.

If the carrier may collect a *part* of its annual transportation charge in advance for the remaining years of its corporate life, it may collect *all*. Suppose the company just organized; under counsel's view the consumer may, there being no legislation on the subject, be com- ✓

pelled to pay the cost of delivering water to him for the entire twenty years of its existence, before he can exercise his constitutional right during a single season.

But there is nothing in the law obliging him to cultivate his land for any particular period. He may not want the water for twenty years, or it may be utterly impossible for him to advance so large a sum at once. In fact, the majority of those who till the soil are too poor to comply with such a demand; to say that they must do so or have no water is to deprive them of their right to its use just as effectually as though the right itself had no existence. It is true these people would not themselves be able to bring water from the natural streams to their farms, and without the carrier they might be compelled to abandon their attempts at agriculture. This consideration, however, only reinforces the position that a reasonable control was intended. The carrier must be regarded as an intermediate agency existing for the purpose of aiding consumers in the exercise of their constitutional right, as well as a private enterprise prosecuted for the benefit of its owners. Yet, if such exactions as the one we are now considering are legal, the carrier might, at its option, in the absence of legislation, effectuate or defeat the exercise of this right; and we would have a constitutional provision conferring an affirmative right, subject for its efficacy in a given section to the greed or caprice of a single individual or corporation.

Besides the extraordinary power mentioned, the carrier would also, under counsel's view, be able to consummate a most unreasonable and unjust discrimination. B. could have water because he can pay for its carriage twenty years in advance; C. could not have water because he is unable to pay in advance for its carriage beyond a season or two.

But, say counsel, C.'s only remedy, and the only remedy of relator and other consumers dissatisfied with the carrier's terms, is by application to the county commis-

sioners. I reply: *First*, that so far as the present case is concerned, this suggestion embodies but little consolation. Relator's land is situate in Arapahoe county. The statute, as it stood when the proceedings described in the alternative writ took place, did not permit the commissioners of that county to act with reference to respondent's canal; while, under the constitution, the commissioners of no other county could exercise the necessary jurisdiction. It was utterly impossible, therefore, for relator to secure relief in the manner pointed out, and if the courts could not take cognizance of the alleged grievance he was wholly bereft of means of redress. I reply: *Second*, that the commissioners may be empowered to fix the maximum *amount* of the rate; that is, they may be authorized to announce a limit beyond which the carrier cannot go. In my judgment, under the constitution they cannot be vested with authority to establish the exact rate to be charged, or to specify either the *time* or *conditions* of payment. The time and conditions of payment are proper subjects for legislation. The legislature doubtless has authority to say that the rate, whether the carrier adopt the maximum fixed by the commissioners or establish one below such limit, shall be collected annually in advance for each irrigating season; or it can make any other reasonable regulations in these respects. But the legislature itself cannot establish the unreasonable rule we have been considering, which enables the carrier to accomplish a wholesale discrimination between consumers, and deny, if it chooses, to a majority of them, the rights secured them by the constitution. A regulation or rule entailing such results, whether established by the legislature or carrier, must be regarded as within a constitutional inhibition. This conclusion is not based merely upon the ground of private inconvenience or hardship; it rests, as will be observed, upon the higher and stronger ground of conflict with the beneficent purpose of our fundamental law.

A further consideration worthy of mention in passing, bearing at least upon the unreasonableness of the view urged upon us, is the position of the consumer who pays the charges for twenty years in advance. What assurance has he that the carrier can or will keep its engagement during that period? Its business is attended with considerable hazard, and requires large and continuing expenditures of money. The consumer may find himself without water, and dependent, for the recovery of his large advancement, upon the doubtful experiment of suit against an insolvent company.

To say that the courts may not interfere, under the circumstances above narrated, is to say that the clear intent of the constitution in relation to a constitutional right may be disregarded with impunity, simply because no express inhibitory constitutional or statutory provision on the subject can be found; also that, for a like reason, one charged with an important duty may condition its performance upon unreasonable and oppressive demands.

I do not usurp the province of the legislature by declaring what would be reasonable requirements as to the time and manner of collecting water rates. My position is that, for the reasons given, respondent's demand of \$10 per acre, as an advance payment of part of the transportation charge for the remaining years of its corporate life, is illegal as well as unreasonable and oppressive.

Respondent's enterprise is of great public importance and benefit. The original construction of its canal cost large sums of money, and its running expenses are necessarily heavy. For a considerable period the capital invested must have been unproductive. These and other circumstances may be proper subjects for consideration by the commissioners, when called upon to establish a maximum rate. And whenever they become appropriate matters for judicial cognizance, the attention deserved will be received from the courts. But no expenditure, however vast, and no inconvenience, however great, can

justify or legalize the exaction, the consumer objecting, of the demand under consideration, as an absolute condition precedent to use for the current irrigating season.

I must not be understood as intimating that this demand is illegal *per se*. And if the consumer, prior to 1887, saw fit to waive his right by voluntarily submitting thereto, both the legislature and courts may be alike powerless to relieve him from the legitimate results of his contract.

When properly understood, the statutes, in so far as they relate to the principal subjects examined, harmonize with the conclusions above stated. Counsel's proposition, that only those consumers who have previously used water are permitted to demand it on payment of the rate established by the carrier, is not sound. The section upon which they rely (1740, Gen. St.) is simply an assurance of the right to *continue*, under specified circumstances, a use already exercised. It does not operate to repeal section 311 of the General Statutes; this section expressly commands ditch companies, having water in their canals not taken, to furnish the same to the class of persons using it, in the manner named by the articles of incorporation, upon payment of the established rate; the declaration therein that this rate shall be fixed by the county commissioners must be taken with the constitutional condition attached, viz.: "Where application is made to them by either party interested." But when the company has a fixed rate of its own, with which the consumer is satisfied, no necessity exists for the making of such application. If counsel's position were correct, the land owner *who has never had the use of water* would, so far as the statutes are concerned, be wholly at the mercy of the carrier. For section 1740 does not give *him* the right to water, even when the *maximum rate has been fixed by the commissioners*.

In view of the foregoing conclusions I need not dwell upon the legality of respondent's demand that relator, as

a condition precedent to the use of water for the season of 1886, enter into the written contract before us. This contract contains a number of conditions that appear unreasonable, and, as I construe the constitution and statutes, are of doubtful legality. But it is sufficient to recall the fact that the unlawful demand of \$10 per acre for the right to use water is a conspicuous provision therein. Relator could no more be required to execute a contract containing this condition than he could be compelled to comply with the demand in the absence of contract.

It is not necessary to consider what would have been the result had respondent charged \$11.50 per acre for the irrigating season of 1886, instead of demanding \$1.50 for that season and \$10 per acre as part payment for future years. Neither is it necessary to speculate as to what respondent would have charged for the season mentioned had the law been understood by its officers according to the construction above given. In view of the pleadings, and especially of the language employed in respondent's contract, I think that relator, upon the showing made, was entitled to the use of water from respondent's canal for the irrigating season specified in the alternative writ. This conclusion is emphasized by the defective condition of the commissioner statute prior to 1887, which left relator helpless so far as action by that body was concerned. I also think that *mandamus* lay for the enforcement of his rights in the premises.

The demurrer should have been overruled and the judgment must, therefore, be reversed, appellant recovering his costs.

But courts do not order the performance of impossible acts. This proceeding was instituted for the purpose of compelling respondent to supply relator with water during the irrigating season of 1886. Since then respondent may have changed its annual charge or rate; besides, the only tender or demand appearing in the record were for

that season. To order compliance with relator's request for 1886 would be absurd; to order a delivery of the water for 1888 would be unwarranted. To permit an amendment of the alternative writ, so as to cover the approaching irrigating season, would be to allow the substitution, in this proceeding, of a new and wholly different cause of action and to violate an established rule of pleading.

The judgment is reversed and the cause remanded.

BECK, C. J. I concur in the foregoing opinion of Mr. Justice HELM as to most of the propositions therein contained. In my judgment the district court had jurisdiction of this cause when it was before it, not upon the principal ground urged by the counsel for appellant, that there was no disagreement between the parties as to the price or compensation demanded by respondent for furnishing the water requested, but on the ground that the terms and demands exacted were unreasonable and illegal.

The record before us does not warrant the proposition of counsel, that, of the two sums of money demanded by the respondent, only the \$1.50 per acre was for compensation for transporting and furnishing the water, and that the \$10 per acre was wholly for royalty, gift or bonus. Possibly a large portion of the latter sum may have been a demand of this character, and consequently without consideration in law or fact.

The alternative writ states, but not wholly *in hæc verba*, the stipulations upon this point of the contracts required to be signed by the consumers of water. The statement is: "Said contracts, after reciting that, in consideration of the stipulations therein contained and the payments as therein specified, the said company, party of the first part, agrees to sell to the consumer of water, the party of the second part, '*the right to receive and use water from the canal of the first party,*' for irrigating the land described, for the sum of money named, and also

'upon the further payment annually in advance, on or before the 1st day of May in each year from the date hereof, such a reasonable rental per annum, not less than \$1.50 per acre, and not more than \$4 per acre, as may be established from year to year by the first party.'"

Appellant's counsel, in discussing the question of jurisdiction, construe the phrase above quoted from the contract, "*the right to receive and use water from the canal of the first party,*" as an attempt on the part of the respondent company to sell a *right* which is, by the constitution, dedicated to the people and vested in the public, and which is, therefore, not a subject of sale. The language may admit of criticism, but it is only slightly variant from the language employed in the constitution respecting the duty of the general assembly to provide by law that the board of county commissioners, in their respective counties, shall have power "*to establish reasonable maximum rates to be charged for the use of water*" furnished by individuals or corporations. And it is not as objectionable as the phraseology of the statutes, which includes such expressions as *selling water, furnishing water for sale, purchasing water*, and the like.

Without any greater liberality of construction than that given the statutes, this contract might be construed to mean, by "the payments as therein specified" for "the right to receive and use water from the canal of the first party," the *consideration* charged by the respondent company for conveying water through its canal and furnishing it for the use of consumers. Now the appellant was unwilling to make all the payments *therein specified*. He tendered a portion thereof and refused to pay the balance. Did not this action on his part fairly give rise to a disagreement or dispute between the parties as to the price to be charged for waters from the ditch? It is my opinion that the nature of the disagreement came clearly within the purview of both the constitution and the statute. But for the defect, therefore, in the statute

(which deprived the appellant of any relief under it), it would have been obligatory upon him, before applying to the district court for relief against the unjust charges and terms imposed by the ditch company, to have made application to the county commissioners of Arapahoe county to establish the maximum rate which the respondent might charge. Therefore he might, or might not, have had a cause of action against the company, depending upon the course subsequently pursued by it. There being no gross wrong without a remedy, however, and the statute then in force affording the appellant no right to apply to said county commissioners to fix a rate, he was justified in applying to the court for relief in the first instance. Respecting the measure of relief which might have been granted, the writ being now *functus officio* as to its principal object, I express no opinion.

The respondent, however, could not legally require payment of the \$10 per acre, or other sum, for a series of years in advance, whether it be regarded as compensation or otherwise. Any sum charged for *royalty* or as a *bonus* would be unconstitutional.

Except in so far as these views may not harmonize with the foregoing opinion, I concur therein.

Reversed.

Mr. Justice ELBERT not sitting.

SCHROERS V. FISK.

1. The forms of actions are abolished, but neither the natural classification of actions according to substance, nor the distinctions between the character of actions, are dispensed with.
2. If judgment is rendered for the defendant on demurrer to the declaration or to any material pleading in chief, the plaintiff can never after maintain, against the same defendant or his privies, any similar or concurrent action for the same cause, upon the same grounds as were disclosed in the first declaration.

Error to Superior Court of Denver.

THE complaint in this action alleges, in substance, that the Denver Fire Insurance Company was a corporation organized under the laws of this state; that it had accepted, under its corporate seal, certain bills of exchange (one of them having been drawn by the plaintiff), and had executed certain promissory notes for the several sums of money, and payable to the respective parties, stated and named in said instruments; that they had been assigned to the plaintiff, and that all of them are due and unpaid. The defendants named in the complaint are Fisk, Russell and Moulton; and the ground of action alleged against them is that they were directors of the insurance company during the years the indebtedness represented by these several instruments were contracted, and that the insurance company failed to make, file and record its annual reports for said years, or any of them, as required by statute, by reason whereof the defendants became jointly and severally liable, under the statute, for said debts. Defendant Fisk, who was the only one served with process, and the only one who appeared to the action, answered, *inter alia*, that the plaintiff on December 26, 1882, instituted an action in the district court of Arapahoe county against the defendant and other persons, all of whom were directors of the said insurance company, for the recovery of the same indebtedness specified in the present complaint. The defendant demurred to the complaint, and his demurrer thereto was sustained by the court, as was also his demurrer to plaintiff's amended complaint subsequently filed in said cause, and thereupon, by consent of plaintiff, final judgment upon the last-mentioned demurrer was entered by the court in favor of the defendant, which judgment still remains in full force. Upon a hearing in the superior court of the issue joined upon this plea of former recovery, a transcript of the pleadings and proceedings had in said dis-

strict court was produced in evidence, and, upon consideration of the law and the evidence, the court held the matters complained of in the present action to be *res adjudicata*, and gave judgment for the defendant. The amended complaint, filed in the district court, shows that the same persons as those named in the present action were defendants, together with three other persons, but that all of them were alleged to have been directors of the insurance company; also, that the claims against the insurance company sought to be recovered in both actions are the same, save that thirty-one bills of exchange and promissory notes, aggregating the sum of \$6,764.50, were included in the complaint filed in the district court, while only twenty-eight of the same, aggregating the sum of \$6,326.70, are included in the present action. The amended complaint alleges that defendant Fisk and others, in the month of August, 1881, with intent to defraud and deceive the public, and particularly the plaintiff and persons thereafter named, confederated and combined together under the name of the "Denver Fire Insurance Company," with the pretended object of insuring property, real and personal, and crops, whether growing or harvested, against loss by fire, lightning, tornadoes and hail storms, and other perils and casualties; that, in furtherance of their fraudulent scheme, the defendants made and filed in the office of the secretary of state, and in the office of the recorder of deeds of Arapahoe county, a paper purporting to be a certificate of incorporation, wherein the defendants purported to have associated themselves together under the name of the "Denver Fire Insurance Company," for the purpose of becoming a body politic and corporate under the laws of the state; that the pretended certificate of incorporation was in the usual form as prescribed by the statute of the state relating to manufacturing and trading corporations; and announced, among other things, that the object of such association was to insure property, real and personal,

against loss or damage by fire and lightning; that its capital stock was \$1,000,000; and named the said defendants and others as trustees for the first year. The subsequent averments are, substantially, that no other certificate or paper whatsoever relating to the affairs of the company was ever filed or recorded, as required by the statute; that the board of directors was organized by the election of a president, vice-president and secretary; that stock-books were prepared and printed; and that the defendants, to carry out their deceit and imposition, and for the purpose of making themselves eligible as officers and trustees under the certificate of incorporation, which required trustees to be stockholders, appropriated to themselves the pretended capital stock, giving therefor spurious checks, drawn upon banks in which they had no funds; and, after taking these various steps, preparatory to the consummation of their deceitful purposes, they published to the world that the company was a corporation duly created and organized, stating the amount of its capital stock, and the object and purposes of its organization. Then follows an averment of the reorganization of the board of directors in the month of January, 1882, which consisted of the defendants named and others, and "that the said pretended board of trustees, as above constituted, continued to act as such board during the time the liabilities hereinafter set forth were incurred; had the care and supervision of the said business, and were charged with the duty to see that the said business was properly managed, and that all statements relating thereto were properly and truthfully made;" that, for the purpose of accomplishing their corrupt and wicked designs, and to give a false and fictitious credit, and to obtain business, the defendants knowingly published false statements of the amount and character of the assets of said insurance company, and the large amount of its paid-up capital stock; whereas, the truth is, said company was not the owner of assets of any value whatever.

and had no paid-up capital stock. That the plaintiff and his assignors, supposing the representations to have been made in good faith, and believing them, were thereby induced to insure their crops in said company; that they paid the premiums demanded, and, while their policies were in full force, their crops were destroyed by hail-storms; that the losses were adjusted by the company, and the said notes and bills of exchange given in liquidation. In connection with the averments concerning the fraudulent means by which the parties were induced to insure their crops, it is alleged that, at the time the defendants advertised that the company would insure growing crops, it was not, and never had been, a valid body corporate, and that no body corporate known by that name had then been created for the purpose and object of insuring growing crops against loss and damage by hail-storm.

Messrs. DECKER and YONLEY and OWEN MCGARR, for plaintiff in error.

Messrs. STALLCUP and SHAFFROTH, for defendant in error.

BECK, C. J. The main question presented for our decision by this record is whether the plea of former recovery interposed in the superior court to the plaintiff's complaint by defendant Fisk was properly sustained. The parties and the cause of action were the same in both cases. The rule of law applies, therefore, that the *prima facie* presumption is that the questions presented for decision were the same, unless it appears that the merits of the controversy were not involved in the issue. If the former suit was brought to enforce the same rights sought to be remedied by the present action, and the judgment pleaded was upon the merits, the bar is complete.

Upon examination of the transcript of proceedings of

the former action in the district court, produced in evidence upon the trial in the superior court of the issue joined on the plea of former recovery, it appears that said Fisk and his co-defendants were charged in the prior suit with the same wrongs, among others, alleged against them in the present proceeding; that they were committed by them in the same official capacity, to wit, as directors of the Denver Fire Insurance Company, and that they resulted in the same alleged damages to the plaintiff. Copies of the same obligations of the insurance company were made exhibits in the complaints in both cases, save that three of those set out in the amended complaints filed in the district court do not appear in the complaint filed in the present action. The measure of damages, also, is the same in both cases.

It is earnestly contended by counsel for plaintiff in error that the present suit is a wholly different kind of an action from that instituted in the district court; that it is based upon an essentially different right or ground of recovery, and that the judgment upon the demurrer in the prior suit did not go to the merits of the controversy, and for these reasons is not a bar to the present action. Counsel say the former action was *ex contractu*; that it was brought upon the promissory notes and bills of exchange given and accepted by the insurance company in liquidation of the losses sustained by the insured, not as the contracts of the company, but as the contracts of the defendants, on the theory that there never existed a corporation known as the "Denver Fire Insurance Company." Upon the other hand, they say the present action is in form *ex delicto*; that it asserts the organization and existence of a valid corporation, of which the defendants were directors, and that the ground of recovery against them stated and relied upon was the failure of the corporation to make, file and record its annual statements, as required by the statute, in consequence whereof the directors became individually liable for the

debts of the corporation. Counsel are correct in their propositions respecting the character of the present action, and the ground of recovery relied upon, but we cannot indorse their propositions as to the point of variance between this and the prior suit. Concerning the supposed theory of the amended complaint, filed in the district court, that the insurance company never was a corporation, an inspection of the complaint shows that such could not have been the theory of the pleader, for he alleges a compliance with the forms and requirements of the statute on the part of the corporators, in the organization of the insurance company; the filing of the certificate of incorporation, naming the persons who should constitute the board of directors for the first year, its organization by the election of a president, vice-president and secretary; the opening of books, and the issuing of a prospectus and statement, proclaiming the organization, the purposes thereof, the amount of capital stock, etc. The amended complaint shows that the company had a seal, stock-books, and that it issued policies of insurance and transacted business under its corporate name and seal; that the defendants named in both actions, with others, assumed the management of its affairs on a certain day, and were acting as its board of directors when the liabilities complained of were incurred; that they "had the care and supervision of the said business, and were charged with the duty to see that the said business was properly managed, and that all statements relating thereto were properly and truly made." The losses set out as the measure of damages, also, are alleged to have occurred while the contract of insurance was in full force. It is true, every act done and step taken is charged to have been performed in furtherance of the original scheme to defraud the public generally. It is also true that, in the thirteenth paragraph of the amended complaint, it is averred that at the time the defendants caused it to be advertised that the company would insure

growing crops against hail-storms, the company was not a valid body corporate; but this averment appears to have been based on the alleged fraudulent intents and purposes of the corporators in the organization of the corporation, upon which fraudulent conspiracy, together with the alleged deception and fraud practiced in the conduct of its affairs, the liability of the defendants for the damages due the plaintiff were predicated. The contracts of insurance are referred to as the contracts of the defendants, but it is averred that they were made in the name of the company, and the policies so issued. Upon the allegations of this complaint there appears to have been such a compliance with the forms of law as to constitute a corporation *de facto*, and one that would have required a direct proceeding to dissolve, while it assumed to do business under its charter. *Murphey v. Mooney*, 5 Colo. 282; *People v. Cheeseman*, 7 Colo. 376. That the character of the prior action was not *ex contractu* is apparent from the form of the averments. Nearly, if not quite, every paragraph of those lengthy pleadings, the original and amended complaints, are prefaced with charges of intent to deceive and defraud the patrons of the company, or with violations of the statute in the conduct of its business. The basis of the action was tort, and the ground of recovery against the defendants relied upon was their participation in the tortious acts complained of. The contracts of insurance, and the contracts of the insurance company in liquidation of the losses sustained by the plaintiff and his assignors, are set out or alleged, but a legal construction of the amended complaint, as a pleading, requires us to hold that these contracts are averred as matter of inducement, while the liability of the defendants is based, as above stated, upon their tortious acts and wrongful omissions of duty. The *gravamen* of the complaint being tort, it follows that the nature of the former as well as the pending action is *ex delicto*. Under the former system of pleading the prior

action would have been termed an "*action on the case.*" The forms of actions are abolished, but neither the natural classifications of actions according to substance, nor the distinctions between the character of actions, are dispensed with. Bliss, Code Pl. §§ 5, 6, 9. The amended complaint contains the elements of the former action on the case. The injuries sustained by the plaintiff and his assignors are laid as resulting from the torts of the defendants. The character of the charges against them is that of *non-feasance*, *misfeasance* and *malfeasance* in office, as directors of a *de facto* insurance company. The contracts averred are laid as inducement, and the basis of recovery, while the action itself is grounded upon the torts charged, in manner corresponding with the old practice. 1 Chit. Pl. (16th ed.) 148 *et seq.*; Puter, Pl. ch. 8. "In actions founded on torts connected with contracts, so much of the contracts must be stated as is necessary to describe the wrong, and so much as qualifies the nature and character of the wrong." *Newell v. Horn*, 47 N. H. 382; *Railroad Co. v. Constable*, 39 Md. 156. "As I understand it," said Justice McDonald in *Emigh v. Railroad Co.* 4 Biss. 114, "the subjects proper for action on the case are of two distinct classes: *First*, where there is a tort committed without force on the person, character or property of the plaintiff, entirely unconnected with any contract; *secondly*, when there is a contract, either express or implied, from which a common-law duty results, an action on the case lies for a breach of that duty; in which case the contract is laid as mere inducement, and the tort arising from the breach of duty as the *gravamen* of the action."

The case of *Salmon v. Richardson*, 30 Conn. 360, is quite similar, in many particulars, to the case presented by the amended complaint. The plaintiff charged that he was induced to insure his property in the Bridgeport Insurance Company, through the false and fraudulent representations of the defendants, made by them as di-

rectors of said company, concerning its assets and financial condition. The declaration alleged "that * * * for the purpose of giving the company a false and fictitious credit, and to increase the business of said company, the said directors, the defendants, did falsely and fraudulently represent and publish to the world, as and for the true condition of the affairs of said company, that the said company was possessed of a very large amount of property, of great value, to wit," stating its assets to be of the value of \$367,147.12; that the plaintiff, relying upon the representations so made, insured his property in the company, and paid the premium required; that his property was destroyed by fire, without his fault, proof of loss made in the manner prescribed, and a failure to pay the loss; that the company was not the owner of the assets specified, nor of any valuable assets, but was wholly insolvent, all of which was well known to the defendants. The foregoing averments are so similar in form and substance to those contained in this amended complaint as to render it probable that they may have been used as a precedent. That was an action on the case against the directors of the Bridgeport Insurance Company to recover the amount due the plaintiff on a policy of insurance. The declaration set out the contract of insurance in connection with the tortious acts of the directors which induced him to enter into it, and alleged the failure of the company to pay the insurance money. The court held that the action was not founded upon the contract, but upon the fraud of the defendants in inducing the plaintiff to enter into it; that, while no suit could be maintained against the directors upon the contract, it being the contract of the corporation and not of the directors, for which reason no privity of contract existed between the plaintiff and the defendants, yet the defendants having availed themselves of the facilities afforded by their office and position as directors to perpetrate a fraud upon the plaintiff for the benefit of the corpora-

tion, and for their own pecuniary profit, they were personally liable for the injury sustained by the plaintiff.

In the suit brought in the superior court a single ground of recovery was relied upon, viz., the failure of the corporation to make, file and record the annual report of its financial condition as required by section 16, chapter 19, General Statutes, which provides that a failure to comply with the requirements, in cases like this, where the capital stock is not fully paid in, shall make the directors of the corporation jointly and severally liable for all debts contracted during the year preceding. The right of recovery in the *former* action, as disclosed by the amended complaint, was based on *two grounds*: One was the failure to make and file the annual report, in conformity with the requirements of the statute; the other was based upon the malfeasance of the directors in the administration of the affairs of the corporation; the false and fraudulent publications made or authorized by them concerning the large amount of paid-up capital stock which it owned; the false statements concerning its assets and liabilities, and the fraudulent diversion of its business into channels not authorized by its charter. It is not within the purview of this review to pass upon the *sufficiency* of the amended complaint to support the action upon both or either of the grounds above mentioned. Undoubtedly it was defective or the demurrer would not have been confessed. But the material question is, Were the same rights involved in both suits, supported by the same facts? The question has been fully answered. The character of the two actions is the same. The complaints in each show a corporation *de facto*. Both charge a wrongful neglect of duty, which makes the defendants, its directors, jointly and severally liable for the debts of the corporation under the statute. The same claims or debts for which the directors are sought to be made liable in the second suit were included in the first.

The objection that the former judgment did not go to the merits is not well taken. The same cause of action was stated, as we have seen, in both cases. Twelve grounds of demurrer were assigned to the amended complaint, some of them going directly to the merits of the action. The demurrer being confessed by the plaintiff, these grounds of demurrer were included, and the judgment, being likewise by consent, was a judgment upon the merits. "If judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant or his privies any similar or concurrent action for the same cause, upon the same grounds as were disclosed in the first declaration; for the reason that the judgment upon such a demurrer determines the merits of the cause, and a final judgment deciding the rights must put an end to the dispute, else the litigation would be endless. *Gould v. Railroad Co.* 91 U. S. 526. The judgment of the superior court must be affirmed.

Affirmed.

INDEX.

ABATEMENT: See PLEADING, 2.

ACCEPTANCE:

1. A written indorsement upon the back of an order limiting the conditions of the order, and made before its present issue for acceptance, constitutes a part of the order. *Hughes et al. v. Fisher*, 883.

2. A conditional acceptance of an order becomes absolute upon the happening of the condition. *Ib.*

3. A. accepted an order drawn by B. for \$115, the acceptance being conditional upon the receipt of money by A. coming to B. The proof showed that thereafter A. received \$2,000. *Held*, that the acceptance became absolute, there being no proof to show that the sum received was exhausted by orders previously accepted. *Ib.*

4. The promise to pay the debt of another out of moneys when received, belonging to that other, but to be paid the promisor, is not a promise to pay the debt of another within the meaning of the statute of frauds. *Ib.*

5. *Held*, that section 14 of the Civil Code, prior to 1887, related to practice before justices of the peace, and that under said statute it was no misjoinder of parties to include the maker and acceptor of an order as defendants in the same action. *Ib.*

ACCOUNT:

Proof of an account should be made by producing the books in which it is entered, or by offering a copy of the account, properly identified, but the failure so to do may not be fatal to a recovery. *McDonald v. Clough*, 59.

ACTIONS:

1. The forms of actions are abolished, but neither the natural classification of actions according to substance, nor the distinctions between the character of actions, are dispensed with. *Schroers v. Fisk*, 599.

2. If judgment is rendered for the defendant on demurrer to the declaration or to any material pleading in chief, the plaintiff can never after maintain, against the same defendant or his privies, any similar or concurrent action for the same cause, upon the same grounds as were disclosed in the first declaration. *Ib.*

AGENT:

1. The act of an agent outside of the line of his authority is not binding upon the corporation, but corporate liability may ensue from the subsequent ratification of the unauthorized act. *Hoosac M. & M. Co. v. Donat*, 529.

2. Where a complaint in an action for damages avers the making of a certain contract by a corporation, it is competent to show either an original execution with due authority or a subsequent

AGENT — Continued.

ratification; and an allegation in the answer that there was no ratification amounts merely to a traverse. *Ib.*

8. Ratification of an unauthorized contract is often presumed from the failure of the principal to repudiate within a reasonable time after notice of its existence; provided, the other party, in good faith, expends money and labor under it. *Ib.*

ALIMONY:

1. It is sufficient to justify the granting of an order upon application for alimony *pendente lite*, that a *prima facie* case is presented by the complaint, and that it be made to appear that the necessities of the wife and the financial ability of the husband render such order proper and necessary. *Cowan v. Cowan*, 540.

2. Where an injunction issued enjoining a defendant from encumbering or selling his property on the filing a bill for divorce, and the injunction remained in force at the time of an application for temporary alimony, the defendant, in order to avail himself of the fact as a ground of defense, must set up the fact in his answer to the petition. An averment that his answer to the original complaint is made part of his answer to the petition is insufficient. *Ib.*

3. There being no certainty, nor even a promise, that an arrangement for supplies would be continued throughout the litigation, an order on the subject requiring the defendant to pay a stated sum monthly for the purchase of the supplies for the plaintiff and her children, *held* to be proper and necessary. *Ib.*

4. On the hearing of a petition for alimony *pendente lite*, it was shown that the wife, with her children, occupied the same house with her husband, but that he slept in a room to himself, did not eat at the same table, and that they did not cohabit as husband and wife at the time of the filing of the bill and for many months previous. *Held*, this was such an abandonment of the relation as would entitle the wife to alimony *pendente lite*. *Ib.*

5. This court will not interfere with an order allowing temporary alimony unless it shall appear that there has been a clear abuse of discretion or a violation of the law by the lower court in the order made. *Ib.*

ALTERATIONS:

In an action on a promissory note by an indorsee, where the defense was that the interest clause in the note, when delivered to the payee, read as follows: "With interest at — per cent. per — from — until paid," and that the indorsee subsequently, without authority, filled up the blanks so as to make the note read, "With interest at two per cent. per month from date until paid," *held*, on demurrer to the answer, that the delivery of the note with such blanks did not impart authority in the holder to fill them, and that such insertions made by the indorsee without the knowledge or consent of the maker rendered the note void. *Hoopes v. Collingwood*, 107.

APPEAL:

1. The payment to a justice of the peace of the cost of granting an appeal from his judgment within ten days of the rendition of the judgment is not a condition precedent to the right of appeal. *Carbonate Town Co. v. Ives*, 81.

2. Appeals from judgments of justices of the peace in cases of forcible entry or unlawful detainer lie to the county court. *Reynolds v. Larkins*, 126.

APPEAL — Continued.

3. The territorial jurisdiction of justices of the peace in these actions is co-extensive with their respective counties. *Ib.*

4. Under the statutes the superior court of Denver has jurisdiction in appeals from decisions of justices of the peace in garnishment causes. *Welsh v. Noyes*, 133.

5. To warrant the execution of an appeal bond by an attorney in fact, authority therefor, of equal extent with the bond, is necessary, and should accompany the bond; and, when the authority of the agent is challenged by motion to dismiss the appeal, it should be produced; but, under General Statutes, section 1986, the appeal should not be dismissed because the appellant does not, upon the bond being declared insufficient, ask leave to file one that is sufficient. Under such circumstances, the court should enter a rule, to be made absolute on the appellant's failing to file such bond within a reasonable time. *Schofield v. Felt*, 146.

6. Where the appeal bond has been filed and approved, and an appeal accordingly prayed, within the ten days fixed by General Statutes, section 1979, the failure to pay to the justice the costs of the appeal within that time is no ground for dismissing the appeal. *Ib.*

7. When the record shows no foundation for the errors assigned they will be disregarded on appeal. *Leach v. Lothian*, 439.

APPEARANCE:

An unlimited appearance by counsel for defendant in the county court, after appeal from a justice, announcing himself ready for trial, waiving a jury, and permitting a witness to be sworn before calling attention to his motion to quash the service of process, is a waiver of any objection under the motion. And the truthfulness of the record in this court showing these facts cannot be contradicted. *D. & R. G. Ry Co. v. Neis*, 56.

APPROPRIATION ORDINANCE:

It is not necessary that the annual appropriation ordinance or bill, required by statute of a city, specify each particular office and the exact sum to be paid the incumbent thereof. *City of Leadville v. Matthews*, 125.

ASSESSMENTS:

1. General Statutes 1883, section 2825, and Session Laws 1885, page 317, section 1, vest the board of county commissioners with power almost unlimited to correct any errors that may occur in an assessment, either before or after the payment of taxes thereon, and an injunction will not issue to restrain the collection of a tax, at the suit of a property owner alleging that the assessor himself had assessed the property, on an excessive valuation, without giving him an opportunity to make a return. *Breeze v. Haley*, 5.

2. Where no injury is caused by the delay, the failure of the assessor to complete the assessment for delivery to the county clerk by June 25th, the date fixed by General Statutes 1883, section 2856, will not render the tax invalid. Where the assessment was made out and delivered during the first meeting of the board of equalization in July, held to be a substantial compliance with the statute. *Ib.*

3. The fact that the weather, feed and market were unfavorable at the time the treasurer distrained the horses and cattle of the plaintiff for a tax is no ground for injunction to restrain the sale, especially when the plaintiff, by his conduct and requests for time,

ASSESSMENTS — Continued.

induced the delay to a season so unfavorable to an advantageous sale. *Ib.*

4. Grants of powers to make local assessments are strictly construed and must be strictly followed. *Keese et al. v. City of Denver*, 112.

5. It is a general rule applicable to the corporate authorities of all municipal bodies, that when the mode in which their power on any given subject can be exercised is prescribed by the charter, the mode must be followed. The mode in such cases constitutes the measure of power. *Ib.*

6. An assessment under the statute authorizing the cost of sewers to be levied against property in a district according to area and not based upon value, benefits or improvements, *held* to be a valid assessment under the police power. *Ib.*

7. An objection that the assessments were not made by the city assessor as required by the charter, *held* to be an objection going to an irregularity that in no way affected the tax-payer. *Ib.*

ASSIGNMENT OF DEBT:

1. The keeper of a boarding-house for railroad employees made an agreement with the railroad company whereby the boarding dues of each employee were deducted from his pay, and forwarded in the form of a check to the boarding-house keeper each month. Subsequently he procured an advance of money from a bank on the credit of the amounts which were to fall due on the following pay-day, and by promising to turn such amounts over to the bank. The railroad company consented to transfer such payments to the bank. *Held*, that this constituted an equitable assignment of such sums so as to vest title in the bank as against a creditor of the boarding-house keeper, who garnished the same in the hands of the railroad company. *Chamberlin v. Gilman*, 94.

2. Subsequent declarations of the boarding-house keeper indicative of an intention to set apart such sums to the payment of his debt to plaintiff in garnishment are not admissible in evidence to impeach the title vested by the prior assignment. *Ib.*

3. The mere fact that the railroad company, after it had consented to the transfer of the indebtedness to the bank, continued to draw its check in favor of the boarding-house keeper, *held*, not to divest the bank of the title acquired under the equitable assignment. *Ib.*

4. Whether the railroad company had notice of such assignment in no way affects the rights of plaintiff in garnishment, and therefore the admission of evidence of such notice is not prejudicial error. *Ib.*

5. Such an assignment may be by parol, and is not affected by the statute of frauds, which require sales and assignments of goods, and grants or assignments of trusts, to be evidenced in writing. *Ib.*

6. Where the intervenor in a garnishment claims title through an equitable assignment of the fund, based, in addition to other evidence, upon verbal declarations and conduct, it is not error to refuse an instruction which assumes that the intervenor's title depends solely upon a written order. *Ib.*

ATTACHMENT:

Defendant in an attachment suit objected to the jurisdiction of the county court, on the grounds that the justice, before whom the case was first tried, did not cause notice of the suit to be published as required by law; and that the constable did not retain the summons put into his hands for serving until the date of the trial. *Held*,

ATTACHMENT — Continued.

that by filing his appeal bond in the appellate court, the defendant waived objection to the jurisdiction of that court. *Charles v. Amos*, 272.

ATTORNEY'S FEES:

1. In Colorado attorney's fees are not taxable; they are regulated by contract between him and his client. *Fillmore v. Wells*, 228.

2. The attorney's statutory lien upon a judgment covers all fees, or balances of fees, due for services previously rendered his client, whether the amount of such fees has been agreed upon or is to be settled in a suit, as upon a *quantum meruit*. *Ib.*

3. Such lien reaches the fruits of a judgment relating to realty as well as the fruits of money judgments. *Ib.*

4. The attorney may waive his right to the benefit of his lien; and if, without notice that he intends to enforce the same, an innocent third person purchases the realty covered by the judgment, or the judgment debtor make a *bona fide* settlement of the judgment, the attorney cannot hold the realty on the one hand, or look to the debtor on the other. *Ib.*

5. A suit may be brought in equity for the enforcement of this lien, and the amount of the attorney's compensation, together with controversies relating to the contract of employment, may be determined in such suit. *Ib.*

6. The attorney's lien attaches under the statute, even though the land recovered by the judgment becomes part of a trust estate belonging to wards, and suit may be brought directly against this part of the trust estate, without first obtaining individual judgments against the guardians. *Ib.*

BILLS OF EXCHANGE:

1. A written indorsement upon the back of an order limiting the conditions of the order, and made before its present issue for acceptance, constitutes a part of the order. *Hughes et al. v. Fisher*, 383.

2. A conditional acceptance of an order becomes absolute upon the happening of the condition. *Ib.*

3. A. accepted an order drawn by B. for \$115, the acceptance being conditional upon the receipt of money by A. coming to B. The proof showed that thereafter A. received \$2,000. *Held*, that the acceptance became absolute, there being no proof to show that the sum received was exhausted by orders previously accepted. *Ib.*

4. The promise to pay the debt of another out of moneys when received, belonging to that other, but to be paid the promisor, is not a promise to pay the debt of another within the meaning of the statute of frauds. *Ib.*

See PROMISSORY NOTES.

BILL OF EXCEPTIONS:

1. An objection that the evidence did not support the verdict will not be inquired into on appeal, where the bill of exceptions shows affirmatively that the evidence elicited in the case is not contained therein. *Gibbs v. Wall*, 153.

2. A plea in abatement must be specific. The proceedings before a justice on such plea must appear in evidence at the retrial on appeal, and be preserved by the bill of exceptions, or they will not be considered by this court. *Craig v. Smith*, 220.

3. Under Code Civil Procedure, section 195, which authorizes either party to a suit, upon the refusal of the trial judge to sign a

BILL OF EXCEPTIONS — Continued.

proposed bill of exceptions, to make such bill a part of the record by procuring and attaching to the bill "the affidavit of two or more attorneys of the court, or other persons who were present" at the trial, that the bill "is correct and true," the affidavits of attorneys who had no participation in or connection with the case tried are required; and the affidavit of one such other person is not sufficient. *Thornily v. Pierce*, 250.

4. This court cannot review the findings of the court below upon which a decree is based, unless the bill of exceptions brings up the evidence upon which the findings are to be reviewed; and when this is not done, this court will assume that the evidence given was sufficient to justify the decree. *Nevin v. Lulu & W. S. M. Co.*, 857.

BOOKS OF ACCOUNT: See EVIDENCE, 2.

BONDS ON APPEAL:

1. To warrant the execution of an appeal bond by an attorney in fact, authority therefor, of equal extent with the bond, is necessary, and should accompany the bond; and when the authority of the agent is challenged by motion to dismiss the appeal, it should be produced; but, under General Statutes, section 1986, the appeal should not be dismissed because the appellant does not, upon the bond being declared insufficient, ask leave to file one that is sufficient. Under such circumstances, the court should enter a rule to be made absolute on the appellant's failing to file such bond within a reasonable time. *Schofield v. Felt*, 146.

2. Where the appeal bond has been filed and approved, and an appeal accordingly prayed, within the ten days fixed by General Statutes, section 1979, the failure to pay to the justice the costs of the appeal within that time is no ground for dismissing the appeal. *Ib.*

3. An appeal bond, the condition of which is "to prosecute the appeal with effect and without delay, and pay whatever judgment might be rendered against appellant on the trial or dismissal of his appeal in the district court," is clearly enough expressed to support an action, when there is a neglect to pay the judgment rendered in the district court. *Crane v. Andrews*, 265.

4. The penalty in an appeal bond is not the limit of the liability of the obligors therein, in an action thereon, but recovery may include the costs of the suit and damages for the detention of the debt assumed in the bond. *Ib.*

5. There is no distinction between the extent of the liability of the principal and surety in an appeal bond. *Ib.*

BROKER:

1. Leaving a description of property by the owner or his agent with a real estate broker, accompanied by a request to sell on terms and at a price designated, is a sufficient contract of employment. *Long v. Herr*, 380.

2. A real estate broker is entitled to his commission when he has procured a party ready to purchase on the owner's terms, though he has not made a binding contract for the sale of the real estate with such person. *Buckingham v. Harris*, 455.

3. In an action by a real estate broker for his commission, it was shown that he procured a purchaser who was ready and willing to pay the price set upon the land in the broker's hands for sale by the owner thereof, and that the only reason the owner would not sell was because the commission asked by the broker, being the same provided by his contract with the owner, was more than the owner

BROKER—Continued.

wished to pay, and that the owner had concluded to hold for a higher price. *Held*, that the broker had performed his part, and was entitled to his commission. *Ib.*

4. It is not error to admit evidence of the value of services performed by a real estate broker in corroboration of his statement as to the express agreement for such services, and to support an allegation of the express agreement contained in the complaint. *Ib.*

5. An instruction that conduct which imputes bad faith upon the part of an agent to sell real estate must be shown by the party claiming it; an instruction to the jury that the burden rests upon him to prove such conduct is not error. *Ib.*

CAVEAT EMPTOR:

1. A purchaser at a sheriff's sale, as well as a party redeeming, is bound at his peril to inquire whether it sufficiently appears on the face of the record that the court had jurisdiction. *Union Iron Works v. Bassick M. Co.*, 24.

2. It is true that courts of equity interfere not only to remove, but to prevent, a cloud upon title, but it is a general rule that the enforcement of a legal right will not be enjoined in equity except upon a clear showing of a right superior to that which it is sought to enjoin. *Ib.*

3. The rule is that a sale of real estate under legal process will not be enjoined because of irregularities in the proceedings, or because the judgment upon which process issued was void, where no serious injury or embarrassment to title is shown as likely to result from allowing the sale to proceed. *Ib.*

4. The rule of *caveat emptor* applies against a mechanic as well as in the case of a vendee. *Tritch v. Norton*, 337.

CERTIFICATE OF MINING CLAIM:

1. Under Revised Statutes of United States, section 2334, providing that the record of a mining claim shall contain a description of the claim located by reference to some natural object or permanent monument, a certificate giving the courses of two mountain peaks, in degrees and minutes, from the discovery shaft, was *prima facie* sufficient, and properly admitted in evidence. *Craig v. Thompson*, 517.

2. Where one had made a location of a mining claim, valid in other respects, but had failed to file for record a valid certificate, an amended certificate, made before defendant had acquired intervening rights, would, as to him, relate back to and preserve the claim as originally located and staked. *Ib.*

CERTIFICATES OF STOCK: See STOCKHOLDERS.**CHANGE OF VENUE: See VENUE.****CHATTEL MORTGAGES:**

A reservation to the mortgagor of chattels of the right to sell the mortgaged property renders such mortgage void *ab initio* as to creditors and incumbrancers. *Brasher v. Christophe*, 284.

CLOUD UPON TITLE: See CAVEAT EMPTOR.**CONDEMNATION PROCEEDINGS:**

1. In a proceeding to set aside a report of commissioners awarding compensation and damages in a proceeding condemning lands for railroad purposes, it was alleged that an agreement granting a right of way over certain adjoining land, procured by the railroad

CONDEMNATION PROCEEDINGS — Continued.

company for the benefit of the owners injured, thereby connecting and improving the lands sought to be condemned, had not been taken in consideration by the commissioners in making their report. *Held*, that as such agreement was only a few months old, had not been recorded, nor in any way brought to the attention of the public, and there had been no use of the way by the public, it was of no effect as a dedication such as could benefit the owner. Nor can it be said that by virtue of such an agreement an easement attached, as appurtenant to the land sought to be condemned. *Burlington & C. R. R. Co. v. Schweikart*, 178.

2. The constitution of Colorado (article 2, § 15), and the eminent domain act (Code Civil Proc., 74), contemplate a compensation in money to one whose lands are condemned for railroad purposes, and therefore, being inadmissible to reduce his compensation, the commissioners had no power to consider the agreement. The acceptance of such privilege cannot be compelled, but depends on the consent of the parties. *Ib.*

CONTAGIOUS DISEASE:

Under the statutes the whole of a county may be required to pay the charges incurred in staying the spread of contagious disease therein, instead of that portion thereof constituting the certain community wherein the disease was first discovered. *County of Saguache v. Decker*, 149.

CONTRACTS:

1. In an action against the owner of a house by a mechanic who did some of the work in the building of it, it appeared that the contract for the building was made with other parties; that, some changes becoming necessary, plaintiff was consulted as to what he would charge for them, and an agreement for making them at such prices was indorsed on the original contract and signed by the original contractors, defendant saying to plaintiff that he would put it into the contract. Defendant also testified that he told plaintiff explicitly that he would not contract with him, but only with the original contractors. *Held*, that there was no contract between plaintiff and defendant, and the action could not be maintained. *Dunning v. Thomas*, 84.

2. An agreement between defendant and his wife, to the effect that she would assume and pay the indebtedness of defendant to plaintiff, does not release defendant where plaintiff was not a party to the agreement. *Charles v. Amos*, 272.

3. Courts do not enforce contracts between parties, the execution of which is legally impossible. *Tritch v. Norton*, 337.

4. Leaving a description of property by the owner or his agent with a real estate broker, accompanied by a request to sell on terms and at a price designated, is a sufficient contract of employment. *Long v. Herr*, 380.

5. The damage to support an estoppel against the owner of an estate and convert him into a trustee must be something more substantial than what would technically amount to a consideration in a contract. It must be of such a character that the person sustaining it cannot be put back into his former condition, and cannot be adequately compensated by pecuniary damages. *Stewart v. Stevens*, 440.

6. A contract was made between several parties, among them plaintiff and defendant, by which they agreed to form a company and dig a ditch across specified lands, to be dug and sustained by the parties to the contract in proportion to the lands benefited.

CONTRACTS — Continued.

The company was afterwards dissolved before the ditch was dug. *Held*, that this agreement did not give an individual member of the company, after the dissolution of the latter, a right to dig a ditch across another individual member's land. *Ib.*

7. If it is conceded that such agreement gave such right as to lands described, it could not give the right as to lands owned by a member, but not described. *Ib.*

CONTRIBUTORY NEGLIGENCE: See NEGLIGENCE, 4, 5.

CONSTITUTIONAL LAW:

1. Section 21 of article V of the state constitution, prescribing that a bill shall contain but one subject, which shall be clearly expressed in the title, must receive a reasonable interpretation, and whenever a matter contained in the statute may fairly be considered germane to the subject expressed by the title it is sufficient. *Dallas v. Redman*, 297.

2. It is well settled in this state that the constitution is not a grant of power to the legislature, but that the legislature is invested with plenary power for all the purposes of civil government, and that the constitution is but a limitation upon that power. *People v. Fleming*, 558.

3. The power to confer upon the persons named in the general law for the incorporation of cities and towns authority to do certain acts therein specified, not being prohibited by the constitution, such law is not unconstitutional by reason of the delegation of such authority. *Ib.*

4. This court cannot pass upon the expediency or policy of a statute; these are questions upon which the judgment of the legislature cannot be reviewed by the courts. *Ib.*

CONSTRUCTION OF STATUTES:

1. Where a statute would operate unjustly, or absurd consequences would result from a literal interpretation of terms and words used, the intention of the framers, if it can be fairly gathered from the whole act, will prevail. *Murray v. Hobson*, 66.

2. A subsequent statute, revising the whole subject-matter of a former statute, and evidently intended as a substitute for it, although it contains no express words to that effect, must operate as a repeal of the former. *Keese v. City of Denver*, 112.

3. In the absence of any emergency clause, in view of the constitutional provision (sec. 19, art. V), the expression "after the passage of the act," as used in the law, can have but one meaning, namely: after the act goes into effect. In the construction of statutes, general terms are to receive such reasonable interpretation as leaves the provision of the statute practically operative. *Harding v. The People*, 887.

4. The provisions of the act show beyond any question that the clear intention of the legislature was to require all persons desiring to practice medicine or surgery within this state to apply for and receive a certificate of qualification from the state board of medical examiners before they were authorized to do so. *Ib.*

5. Every law which imposes a penalty is not, legally speaking, a penal law; that is, a law which is to be construed with great strictness in favor of the defendant. *Ib.*

See PLEADING, 16, 17; STATUTES.

CONVERSION:

1. The return of the officer levying an attachment and execution showing that he took possession of certain chattels under the writ, and had them sold before the trial of an action to determine the title, is sufficient evidence to sustain a verdict for conversion of the property, the title to which was shown to be in complainant. *Schluter et al. v. Jacobs*, 449.

2. General Statutes, section 2011, provides for summary proceedings to try the right of property, and, if found to be in claimant, for the assessment of damages by the court or jury, and for costs. *Held*, that, having found the property to be in claimant, the court is authorized to receive evidence as to the value of the property taken, although no formal issue of value is raised by the pleadings. *Ib.*

CORPORATIONS:

1. The relation of stockholders to the corporation whose stock they hold is that of contract, and the rights and duties of both parties grow out of contract implied in a subscription for stock, construed by the provisions of the charter or articles of incorporation. *Supply Ditch Co. v. Elliott*, 827.

2. The corporation is a trustee for its stockholders and is bound to protect their interests. *Ib.*

3. Certificates of stock are assignable and pass from hand to hand by indorsement as bills of exchange and promissory notes pass, and holders of such certificates are *prima facie* presumed to be *bona fide* owners thereof. *Ib.*

4. A corporation is ordinarily justified in treating the assignee and holder of certificates of stock as the legal and equitable owner thereof. *Ib.*

5. Any transfer of stock by a corporation upon its books, in the absence of the original certificate, is made at its peril, and the real owner of the stock, evidenced by such certificate, loses nothing thereby; upon stock so issued by wrong or mistake the corporation is liable to a *bona fide* holder thereof. *Ib.*

6. The granting of a right of way on a street for a railway by a municipality does not create any liability against the municipality for the damages occasioned by the corporation exercising the rights so granted. The liability in such cases is against the corporation exercising and enjoying the rights so granted. *Sorensen v. Town of Greeley*, 369.

7. Section 30 of the Colorado act of March 14, 1877, providing for the formation of corporations, which provided for service of summons in suits against them, was repealed by implication by the act of March 17, 1877, providing "a system of procedure in civil cases in courts of justice," section 37 establishing a new method of service. *Little Bobtail G. M. Co. v. Lightbourne*, 429.

8. Courts have no jurisdiction to appoint a receiver except in a suit pending in which the receiver is desired. *Jones v. Bank of Leadville*, 464.

9. The appointment of a receiver does not dissolve a corporation either in law or in fact. *Ib.*

10. The surrender of the franchise of a corporation is not an official act, but to be effectual must be the act of the stockholders as such. *Ib.*

11. In the absence of equity jurisdiction, properly invoked, the assets of an insolvent corporation do not constitute a trust fund for *pro rata* distribution among all its creditors, nor in such case does

CORPORATIONS — Continued.

any superior equitable lien exist as against a prior attaching creditor. *Ib.*

12. The act of an agent outside of the line of his authority is not binding upon the corporation, but corporate liability may ensue from the subsequent ratification of the unauthorized act. *Hoosac M. & M. Co. v. Donat*, 529.

13. Where a complaint in an action for damages avers the making of a certain contract by a corporation, it is competent to show either an original execution with due authority or a subsequent ratification; and an allegation in the answer that there was no ratification amounts merely to a traverse. *Ib.*

14. Ratification of an unauthorized contract is often presumed from the failure of the principal to repudiate within a reasonable time after notice of its existence; provided, the other party, in good faith, expends money and labor under it. *Ib.*

See WATER RIGHTS.

CORPORATE TOWNS:

A town which, exceeding its corporate powers, grants permission to a mining company to build a flume in its streets, does not thereby become liable for damage done to adjoining premises by the water leaking from the flume on to such premises. *Town of Idaho Springs v. Filteau*, 105; *Same v. Woodward*, 104.

COSTS:

1. The payment to a justice of the peace of the cost of granting an appeal from his judgment within ten days of the rendition of the judgment is not a condition precedent to the right of appeal. *Carbonate Town Co. v. Ives*, 81.

2. When a county court by an order grants an unconditional change of venue, and afterwards, by another order, requires the party seeking the change to perfect it by paying accrued costs, the latter order is in effect a mere modification of the former, and is invalid; the county court having no power to require payment of costs as a condition precedent. *South Pueblo N. P. & P. Co. v. Moore*, 254.

3. The penalty in an appeal bond is not the limit of the liability of the obligors therein, in an action thereon, but recovery may include the costs of the suit and damages for the detention of the debt assumed in the bond. *Crane v. Andrews*, 265.

COST BOND:

1. The cost bond required of non-residents before commencing suit, if tendered after action brought, even though before the motion to dismiss is interposed, comes too late. *Edgar G. & S. M. Co. v. Taylor*, 110.

2. The right to assign error on the denial of this motion is not waived by pleading over. *Ib.*

COUNTY COMMISSIONERS:

1. General Statutes 1883, section 2825, and Session Laws 1885, page 317, section 1, vest the board of county commissioners with power almost unlimited to correct any errors that may occur in an assessment, either before or after the payment of taxes thereon, and an injunction will not issue to restrain the collection of a tax, at the suit of a property owner alleging that the assessor himself had assessed the property, on an excessive valuation, without giving him an opportunity to make a return. *Breeze v. Haley*, 5.

COUNTY COMMISSIONERS — Continued.

2. Where no injury is caused by the delay, the failure of the assessor to complete the assessment for delivery to the county clerk by June 25th, the date fixed by General Statutes 1883, section 2856, will not render the tax invalid. Where the assessment was made out and delivered during the first meeting of the board of equalization in July, *held* to be a substantial compliance with the statute. *Ib.*

3. The fact that the weather, feed and market were unfavorable at the time the treasurer distrained the horses and cattle of the plaintiff for a tax is no ground for injunction to restrain the sale, especially when the plaintiff, by his conduct and requests for time, induced the delay to a season so unfavorable to an advantageous sale. *Ib.*

COUNTY SUPERINTENDENT OF SCHOOLS:

1. The statutes vest in the county superintendent of schools a large discretion as to the services necessary to be performed by him in the discharge of his official duty. *Smith v. Board of Co. Com'rs Jefferson Co.*, 17.

2. When he renders to the board of county commissioners an account of his services and mileage for a month or a quarter of a year, made out and verified as the law requires, he has established a *prima facie* case in his favor. No authority exists to reject any item or charge upon inspection merely, unless it clearly appears therefrom that such item is incorrect or illegal. *Ib.*

3. Courts are not disposed to interfere with the exercise of mere discretionary authority. *Ib.*

4. Every reasonable intendment is to be made in favor of the acts of public officers, who are sworn to perform their official duties correctly, so long as they appear to be acting in good faith, with due care and discretion, and within the limits of their conceded powers. *Ib.*

5. The law does not recognize fractions of days. And when it provides a *per diem* compensation for the time necessarily devoted to the duties of an office, the officer is entitled to his daily compensation for each day on which it becomes necessary for him to perform any substantial official service, if he does perform the same, regardless of the time occupied in its performance. *Ib.*

6. Under the statute the accounts of the county superintendent of schools should be kept in such a manner that the officer may not only be able to itemize his accounts as required, but to explain them as well, if called upon to do so. *Ib.*

COUNTY TREASURER: See ASSESSMENTS, 1, 2, 3.

COUNTY WARRANTS:

A county, under a statute authorizing the funding of its floating indebtedness, by an election conducted in substantial conformity to the statute, voted to issue bonds as a means of funding such indebtedness. *Held*, that the plaintiff, a holder of county warrants constituting a part of such floating debt, was entitled, upon tendering his warrants, and refusal on the part of the county commissioners to issue to him bonds to the amount of such warrants, to a *mandamus* to compel them to do so. *Board of County Com'rs Summit Co. v. People ex rel. Hurlbut*, 14.

DAMAGES:

1. A town which, exceeding its corporate powers, grants permission to a mining company to build a flume in its streets, does

DAMAGES — Continued.

not thereby become liable for damage done to adjoining premises by the water leaking from the flume on to such premises. *Town of Idaho Springs v. Filteau*, 105; *Same v. Woodward*, 104.

2. The rule is that, for any act obstructing a public and common right, no private action will lie for damages of the same kind as those sustained by the public, although in a much greater degree. *Whitsett v. Union D. & R. Co.*, 243.

3. The penalty in an appeal bond is not the limit of the liability of the obligors therein, in an action thereon, but recovery may include the costs of the suit and damages for the detention of the debt assumed in the bond. *Crune v. Andrews*, 265.

4. Where it is sought to recover such damages as are not the usual and natural consequences of the wrongful act complained of, such damages must be specifically set forth. *City of Pueblo v. Griffin*, 366.

5. The granting of a right of way on a street for a railway by a municipality does not create any liability against the municipality for the damages occasioned by the corporation exercising the rights so granted. The liability in such cases is against the corporation exercising and enjoying the rights so granted. *Sorensen v. Town of Greeley*, 369.

6. The municipal authorities of Denver must exercise ordinary care in keeping the sidewalks free from defects and obstructions, and liability may ensue from injuries occasioned by failure so to do. *City of Denver v. Dean*, 375.

7. An action was brought by an owner of property abutting on one of the streets of a certain addition to the city of Denver to recover damages for injuries done to his property by a railroad company in constructing a road and running its trains the length of the street in front of his premises. *Held*, that since the injuries to the property were done after the state constitution went into effect, its provisions in regard to compensation for the taking or damaging of private property for public or private use may properly be invoked in aid of recovery. *Denver Circle R. Co. v. Nestor*, 403.

8. The damage to support an estoppel against the owner of an estate and convert him into a trustee must be something more substantial than what would technically amount to a consideration in a contract. It must be of such a character that the person sustaining it cannot be put back into his former condition, and cannot be adequately compensated by pecuniary damages. *Stewart v. Stevens*, 440.

DAY: See OFFICES, 2.

DECEDENTS' ESTATES:

The statute (Gen. Laws, §§ 2914, 2915, 2918) prescribes the manner of presenting claims against the estates of deceased persons, and provides a summary method of establishing such claims upon notice at any term of the court subsequent to the issuing of letters testamentary or of administration. Plaintiffs filed their claim against the estate of defendant's intestate November 17, 1879, on a cause of action which had accrued January 20, 1877. Prior thereto, on February 4, 1878, plaintiffs had filed the claim, but withdrew it March 30, 1878. *Held*, that the claim was barred by the statute of limitations as not having been filed within two years after the cause of action accrued. The filing and withdrawal of the claim did not constitute the commencement of an action to prevent the statute of limitations from running. *Moree v. Clark*, 216.

DECLARATIONS:

If, during the existence of a partnership, goods are purchased and received by it, a declaration by one of the partners after the transaction, or dissolution of the firm, that he would not be responsible for the account, does not relieve him from liability. *McDonald v. Clough*, 59.

DEDICATION:

1. Under the Revised Statutes, 1868, page 619, section 5, by the dedication to the city of Denver of the streets of an addition thereto, platted in accordance with the provisions of the statute in force in May, 1876, the said city acquired only a qualified fee therein, in trust for the public for the *ordinary* and *necessary* purposes to which the streets of a city are usually subjected. *Denver Circle R. Co. v. Nestor*, 403.

2. The charter of April 7, 1874, of the city of Denver, giving to the city council power to control its streets, to regulate the construction and operation of street railways, and the running of locomotive engines and cars, and the location and construction of railroad tracks within the city, does not confer upon the council such authority to license the construction of railroad tracks lengthwise of its streets and thoroughfares generally, as to charge the purchasers of abutting property with notice that they may be so used by railroad companies for the running of their trains, in common with every other mode of conveyance. *Ib.*

3. Under the authority of the charter of April 7, 1874, of the city of Denver, defining the powers of the city council with regard to the railroads within the city, and Revised Statutes 1868, page 619, section 5, limiting the city's title to the streets dedicated to it, to a qualified fee, the license given by the city council to a railroad company to construct a track and run its trains lengthwise of a street of an addition is an appropriation of such street to an extraordinary use, not within the contemplation of the act of dedication, nor authorized by any legislative sanction for general application throughout the city, and cannot afford immunity from liability for actual injuries thereby resulting to the property of abutting owners. *Ib.*

4. An action was brought by an owner of property abutting on one of the streets of a certain addition to the city of Denver, to recover damages for injuries done to his property by a railroad company in constructing a road and running its trains the length of the street in front of his premises. *Held*, that since the injuries to the property were done after the state constitution went into effect, its provisions in regard to compensation for the taking or damaging of private property for public or private use may properly be invoked in aid of recovery. *Ib.*

DEEDS:

1. When a statute is referred to by general descriptive particulars, some of which are manifestly false and others true, the former may be rejected as surplusage, provided the remainder is sufficient to show clearly what is meant. *Murray v. Hobson*, 68.

2. A deed of land included in a town site described the land as "designated on the recorded plat as the vacant land formed by change of the bed of the Arkansas river," and by metes and bounds. In an action involving the title to the land conveyed, *held*, that the whole description was properly admitted in evidence, and that oral testimony was admissible to identify the land (especially as no tract designated in the manner stated appeared on the plat), although

DEEDS — Continued.

the plat itself, or a copy, should be produced, or the non-production thereof accounted for, before admitting such oral evidence. *Ib.*

8. Where a trustee in whom is vested, under the law of congress and by patent from the United States, the lands comprising a town site, to be held in trust for the use and benefit of the occupants thereof, has executed a deed of a parcel of such land to one claiming to be a beneficiary of the trust, the legal title of such parcel passes out of the trustee and vests in the grantee; no individual not then a beneficiary can thereafter in his own right question the validity of such conveyance; nor can he, by subsequent intrusion upon the possession of the holder of the legal title, acquire a right to inquire into or litigate the question whether all the preliminaries required by the local law were taken by the party holding the title from the trustee. *Ib.*

4. A deed of land made by the patentee of a town site to a beneficiary under the town-site act granted the land as described, "not interfering with the plan of the streets and alleys adopted in the town plat." *Held*, that this clause did not have the effect to reserve land which would be included within the lines of streets as extended, but which lines were not extended even on the plat, on the theory that such land was within the bounds of projected streets, and that, in ejectment by the successor to the grantee's title, the defendant, a mere intruder, could not set up that the town was entitled, by operation of law or otherwise, to an easement for the extension of its streets and alleys over the tract in question. *Mills v. Hobson*, 78.

DEFAULT:

1. The entry of default and judgment against a defendant before the return day of the summons, in the absence of himself or counsel, is a proceeding *coram non judice*. And the cause remains for trial as though such pretended default and judgment had not been taken. *Yentzer v. Thayer et al.*, 63.

2. Under the statute, if the plaintiff fails to appear before the justice at the hour named in the summons, his record must show either a continuance or dismissal. Being silent in this respect a total discontinuance must be presumed. *Ib.*

8. When the record does not show that a default was not properly entered, the presumption arises that the required notice was given. *Evans v. Young*, 316.

DISCRETION: See COUNTY SUPERINTENDENT OF SCHOOLS, 1, 8.

DISTRICT ATTORNEY:

Under the constitution the office of district attorney must be filled either by election or by appointment. Such officer is also required to be a resident of the district in which he is elected or appointed. However, if the legislature, acting under authority expressly conferred by the constitution, transfers the county in which he resides to another district, he does not become the prosecuting officer of the latter district. *People ex rel. Downer v. Annis*, 53.

DURESS: See VERIFICATION.

EASEMENTS:

Grants of estate and easements of land are, by the statute of frauds, to be evidenced by properly executed and authenticated written instruments, and, except in cases of fraud on the part of the land owner, are not to be otherwise created. *Stewart v. Stevens*, 440.

EJECTMENT:

It is a settled question that, when a defendant in ejectment files a cross-complaint assuming to set up equities entitling him to affirmative relief, the facts relied upon therefor must be as fully stated as they are required to be in an original bill praying affirmative relief. *Murray v. Hobson*, 66.

EMINENT DOMAIN:

1. In a proceeding to set aside a report of commissioners awarding compensation and damages in a proceeding condemning lands for railroad purposes, it was alleged that an agreement granting a right of way over certain adjoining land, procured by the railroad company for the benefit of the owners injured, thereby connecting and improving the lands sought to be condemned, had not been taken in consideration by the commissioners in making their report. *Held*, that as such agreement was only a few months old, had not been recorded, nor in any way brought to the attention of the public, and there had been no use of the way by the public, it was of no effect as a dedication such as could benefit the owner. Nor can it be said that by virtue of such an agreement an easement attached, as appurtenant to the land sought to be condemned. *Burlington & C. R. Co. v. Schweikart*, 178.

2. The constitution of Colorado (article 2, § 15), and the eminent domain act (Code Civil Proc., 74), contemplate a compensation in money to one whose lands are condemned for railroad purposes, and therefore, being inadmissible to reduce his compensation, the commissioners had no power to consider the agreement. The acceptance of such privilege cannot be compelled, but depends on the consent of the parties. *Ib.*

EQUITY:

1. The rule that one or more plaintiffs may bring suit in equity for the benefit of all others similarly situated or interested is well settled. Equity will assume jurisdiction in such cases to avoid a multiplicity of suits. *Keese v. City of Denver*, 112.

2. Plaintiff had brought suit for an injunction to restrain defendants from working certain mines which plaintiff then claimed to own absolutely under a certain conveyance. This action was dismissed with plaintiff's consent. *Held*, that he was not estopped from bringing a suit under the same conveyance as a mortgage, claiming payment thereunder, and, in default of payment, foreclosure and sale. *Nevin v. Lulu & W. S. M. Co.*, 857.

3. In a suit in equity the relief demanded does not limit the plaintiff in respect to the remedy which he may have. The court will disregard the prayer, and rely upon the facts alleged and proved as the basis of its remedial action. *Ib.*

4. This court cannot review the findings of the court below upon which a decree is based, unless the bill of exceptions brings up the evidence upon which the findings are to be reviewed; and when this is not done, this court will assume that the evidence given was sufficient to justify the decree. *Ib.*

5. Under the code, a mortgage cannot be foreclosed without a sale of the mortgaged premises under a decree of foreclosure. *Ib.*

ERRORS:

When the record shows no foundation for the errors assigned they will be disregarded on appeal. *Leach v. Lothian*, 439.

ESTOPPEL:

The damage to support an estoppel against the owner of an estate and convert him into a trustee must be something more sub-

ESTOPPEL — Continued.

stantial than what would technically amount to a consideration in a contract. It must be of such a character that the person sustaining it cannot be put back into his former condition, and cannot be adequately compensated by pecuniary damages. *Stewart v. Stevens*, 440.

EVIDENCE:

1. A witness may testify to so much of a conversation between the parties as he may have overheard, the testimony being otherwise competent. *D. & R. G. Ry Co. v. Neis*, 56.

2. Proof of an account should be made by producing the books in which it is entered, or by offering a copy of the account, properly identified, but the failure so to do may not be fatal to a recovery. *McDonald v. Clough*, 59.

3. Where copies of a town plat were examined by court and counsel on a trial to the court, were marked as exhibits, and copies of them attached to the record, and the judge found that the papers were true copies, and that the original was lost, and could not be produced, *held*, that a technical objection, raised on appeal, that the copies were not introduced in evidence, would not be allowed to prevail. *Murray v. Hobson*, 66.

4. In a description of land in a deed, a call for block 32, *held* properly rejected, where it appeared from the whole description that block 30 was intended. *Ib.*

5. A deed of land included in a town site described the land as "designated on the recorded plat as the vacant land formed by change of the bed of the Arkansas river," and by metes and bounds. In an action involving the title to the land conveyed, *held*, that the whole description was properly admitted in evidence, and that oral testimony was admissible to identify the land (especially as no tract designated in the manner stated appeared on the plat), although the plat itself, or a copy, should be produced, or the non-production thereof accounted for, before admitting such oral evidence. *Ib.*

6. When a statute is referred to by general descriptive particulars, some of which are manifestly false and others true, the former may be rejected as surplusage, provided the remainder is sufficient to show clearly what is meant. *Ib.*

7. It is not error to receive testimony of plaintiffs to facts occurring subsequent to the decease of the defendants' ancestor. *Fillmore v. Wells*, 228.

8. The rule that where the evidence is conflicting, and the verdict is not manifestly against the weight of evidence, the verdict will not be disturbed on appeal, applies equally where a jury is waived and the issues of fact are tried by the court. *Kinney v. Wood*, 270.

9. Courts do not take judicial notice of the statutes of other states; they must be shown like other facts. *Atchison, T. & S. F. R. Co. v. Betts*, 431.

10. The return of the officer levying an attachment and execution showing that he took possession of certain chattels under the writ, and had them sold before the trial of an action to determine the title, is sufficient evidence to sustain a verdict for conversion of the property, the title to which was shown to be in complainant. *Schluter et al. v. Jacobs*, 449.

11. General Statutes, section 2011, provides for summary proceedings to try the right of property, and, if found to be in claimant, for the assessment of damages by the court or jury, and for costs. *Held*, that, having found the property to be in claimant, the court is authorized to receive evidence as to the value of the property

EVIDENCE — Continued.

taken, although no formal issue of value is raised by the pleadings. *Ib.*

12. The admission in rebuttal of evidence which has been shown in chief, or which, more properly, should have been introduced in chief, is not error, as it is a matter within the discretion of the court. *Buckingham v. Harris*, 455.

13. To entitle a party to the protection accorded to privileged communications, the communications must have been made to the counsel, solicitor or attorney acting, for the time being, in the character of a legal adviser, and must be made by the client for the purpose of professional advice or aid upon the subject of his rights and liabilities. *Caldwell v. Davis*, 481.

See ASSIGNMENT OF DEBT, 2, 3, 4, 6.

EXCEPTIONS:

It is not necessary to reserve exceptions to the several provisions of a decree or judgment to entitle a party to assign error, and have reviewed any alleged defect therein, provided a general exception has been duly taken to the judgment or decree. *Cowan v. Cowan*, 540.

FORCIBLE ENTRY AND DETAINER:

1. Appeals from judgments of justices of the peace in cases of forcible entry or unlawful detainer lie to the county court. *Reynolds v. Larkins*, 126.

2. The territorial jurisdiction of justices of the peace in these actions is co-extensive with their respective counties. *Ib.*

FORMS OF ACTION:

The forms of actions are abolished, but neither the natural classification of actions according to substance, nor the distinctions between the character of actions, are dispensed with. *Schroers v. Fisk*, 599.

GARNISHEE PROCEEDINGS:

1. A justice of the peace has, under the statute, jurisdiction to try the issue raised by an answer in garnishee process setting forth that the garnishees held property by virtue of a chattel mortgage to them, to which a traverse is made alleging fraud and delaying creditors, and charging the garnishees with knowledge and participation in the fraud. *Welsh v. Noyes*, 133.

2. Under the statutes, the superior court of Denver has jurisdiction in appeals from decisions of justices of the peace in garnishment causes. *Ib.*

GRANTS:

Grants of estate and easements of land are, by the statute of frauds, to be evidenced by properly executed and authenticated written instruments, and, except in cases of fraud on the part of the land owner, are not to be otherwise created. *Stewart v. Stevens*, 440.

HOMESTEADS:

1. Under the statute concerning homesteads the wife has the character of a head of the family, while occupying with her husband her property as a home, to enable her to designate and affect such home with the character of a homestead, so as to exempt it from seizure and sale for the joint debt of herself and husband. *McPhee v. O'Rourke*, 801.

HOMESTEADS — Continued.

2. There is no proviso in the statute against its operating against a creditor for material used in improvements upon the property before it was designated as a homestead. *Ib.*

3. The homestead character of the property is not vitiated when the designation thereof for a homestead was for the purpose of preventing a creditor from collecting his debt. *Ib.*

HOMICIDE: See MURDER.

HUSBAND AND WIFE:

1. An agreement between defendant and his wife, to the effect that she would assume and pay the indebtedness of defendant to plaintiff, does not release defendant where plaintiff was not a party to the agreement. *Charles v. Amos*, 272.

2. Under the statute concerning homesteads the wife has the character of a head of the family, while occupying with her husband her property as a home, to enable her to designate and affect such home with the character of a homestead, so as to exempt it from seizure and sale for the joint debt of herself and husband. *McPhee v. O'Rourke*, 301.

INDICTMENT:

1. An indictment charging that defendant unlawfully, feloniously, wilfully, purposely, and of his malice aforethought, did kill and murder the deceased, is sufficient to warrant a verdict finding that the homicide was committed with deliberation and premeditation — a finding necessary to authorize the death penalty. *Redus v. The People*, 208.

2. When one is tried as on a charge of murder in the first degree, but the jury find a verdict of murder in the second degree, the error is not cured if the indictment fails to describe the higher grade of the crime. *Ib.*

INDORSEMENT: See BILLS OF EXCHANGE, 1, 2.

INJUNCTION:

1. It is true that courts of equity interfere not only to remove, but to prevent, a cloud upon title, but it is a general rule that the enforcement of a legal right will not be enjoined in equity except upon a clear showing of a right superior to that which it is sought to enjoin. *Union Iron Works v. Bassick M. Co.* 24.

2. The rule is that a sale of real estate under legal process will not be enjoined because of irregularities in the proceedings, or because the judgment upon which process issued was void, where no serious injury or embarrassment to title is shown as likely to result from allowing the sale to proceed. *Ib.*

3. Where an injunction issued enjoining a defendant from encumbering or selling his property on the filing a bill for divorce, and the injunction remained in force at the time of an application for temporary alimony, the defendant, in order to avail himself of the fact as a ground of defense, must set up the fact in his answer to the petition. An averment that his answer to the original complaint is made part of his answer to the petition is sufficient. *Cowan v. Cowan*, 540.

INSTRUCTIONS:

1. If an instruction is not properly incorporated into the record, or if no exception appears to have been taken thereto, appellant will not be heard to complain. *McDonald v. Clough*, 59.

INSTRUCTIONS — *Continued.*

2. If the appellant writes, at the close of each instruction to which he excepts, the words "excepted to," there is a substantial compliance with code of Colorado, page 56, section 69, providing that "a party excepting to the giving of the instructions * * * shall not be required to file a formal bill of exceptions, but it shall be sufficient to write at the close of each instruction to which exception is taken the words 'excepted to,' *which shall be signed by the judge.*" The omission of the judge to sign an instruction so excepted to cannot prejudice the rights of the appellant. *Gibbs v. Wall*, 153.

3. Nor is the omission of the appellee to number the instructions prayed by him, and excepted to by the appellant, a fatal defect. *Ib.*

4. An assignment of error upon an instruction which sets out the instruction excepted to *in hæc verba* is sufficient. *Ib.*

5. Where the only issue made by the pleadings is as to the fact of a warranty as to the disposition of certain horses sold by the defendant to the plaintiff, and there is no plea or proof of accord and satisfaction or payment, there is no foundation for an instruction as to the verdict which the jury should render, if they should find that there had been a settlement between the parties, and it is error to give such an instruction. *Ib.*

6. Where an express warranty is alleged and proved, and there is no contention at the trial as to an implied warranty, an instruction as to the effect of an implied warranty, if proven, is inapplicable to the issue, and is calculated to mislead the jury. *Ib.*

7. An instruction charging the jury that testimony admitted, tending to show that deceased, when intoxicated, was a quarrelsome and dangerous man, was not material in determining the intent with which defendant acted, unless at the time of the homicide he had knowledge of deceased's character in this respect, is not error. *Redus v. The People*, 208.

8. In an action to try title to a mining claim, the court charged the jury that the plaintiff, in order to recover, must prove that he located his claim "by sinking a shaft at least ten feet from the lowest part of the rim at the surface, showing a well-defined crevice; posting at the discovery shaft the usual notice; placing upon the corners and center of the side-lines, stakes, six in all, marked in the usual manner; and record of the claim;" and that if the jury found that the plaintiff proved this, then defendant, in order to make his claim valid, must prove a prior location in like manner. *Held*, that the instruction did not state the requirements of the law as to what the locator of a mining claim must do to make a location, nor did it state the law in regard to marking of the location stakes, or what must be recorded, or when the record must be made, or where; but left the jury to determine the law as well as the fact. *Bryan v. McCaig*, 309.

9. In an action between claimants of a mining claim, there was evidence to show that the ore-house built on the claim by defendant was placed there for the use and benefit of another claim, and the court submitted to the jury the question of good faith and intention of defendant to make an improvement upon the claim. *Held*, not error. To make a building erected upon a mining claim an improvement, under the law requiring annual labor, it must have been placed there for the purpose of benefiting the claim, and for its improvement. *Ib.*

10. The court instructed the jury that plaintiff must prove "that the Apex lode was located by sinking a shaft at least ten feet from the lowest rim at the surface, showing a well-defined crevice." *Held*, that the instruction was erroneous, because it did not submit

INSTRUCTIONS — Continued.

to the jury the question of fact as to whether the crevice contained mineral-bearing rock in place. *Ib.*

11. Under act of congress of March 3, 1881, authorizing the jury to find that the title to the ground in controversy has not been established by either party, a party claiming the right of possession of any part of the public domain, in an adverse suit, by virtue of a mining location, must establish such right by evidence of a compliance with the state and federal statutes relating to the location and holding of mining claims. And it was proper for the court to submit to the jury to find as a question of fact, from the evidence, whether the defendant had complied with such requirements of the statute. *Ib.*

12. An instruction that conduct which imputes bad faith upon the part of an agent to sell real estate must be shown by the party claiming it; an instruction that the burden rests upon him to prove such conduct is not error. *Buckingham v. Harris*, 455.

13. In a suit to establish an adverse mining location, the court, of its own motion, instructed the jury concerning the statutory requirements relating to depths of discovery shafts or open cuts, and length of *adits*. *Held*, that as the jury were properly instructed, and their verdict was supported by the evidence, the rejection of instructions offered on the same points was not error. *Craig v. Thompson*, 517.

14. Where one has long since abandoned any rights he may have had in a mining claim, and was not a party asserting any rights in the action, nor was any one authorized to represent him, instructions asked by defendant as to his rights were properly rejected. *Ib.*

15. An instruction which leaves an issue to the belief of the jury, instead of requiring the jury to determine the issue upon the evidence, is erroneous. *Ingols v. Plimpton*, 535.

16. In an action for rent defendants set up a counter-claim for goods sold plaintiff's son, claiming that plaintiff and her son were partners, and that they had agreed to credit the amount of the bill on the rent. The jury were instructed to allow the claim if they believed the partnership existed; the partnership and agreement being denied. *Held* error, since the individual debt could not be set off against the firm liability without plaintiff's consent, which latter was thus withdrawn from the consideration of the jury. *Ib.*

See MURDER, 5.

INTENT:

If the statute creating an offense is silent concerning the intent, there need be no intent alleged. *Harding v. The People*, 387.

INTERLINEATION: See PROMISSORY NOTES, 1; ORDINANCES, 2.

INTERVENOR: See ASSIGNMENT OF DEBT.

JUDGMENT:

1. Where the judgment includes compensation to which plaintiff is not entitled, it must be reversed. *D. & R. G. Ry Co. v. Neis*, 56.

2. Where the evidence on the trial was conflicting the judgment will not be reversed on the ground of insufficient evidence to support it. *Polk v. Mook*, 326.

3. Plaintiff sued on a due-bill for money borrowed, and for \$5 for work and labor. Defendant admitted owing \$3 for labor, claimed that the due-bill was for money on deposit with him, and for counter-claim alleged that plaintiff occupied a certain dwelling-house by his permission, and had never paid for the same, but did not allege any right or interest in the house entitling him to demand rent.

JUDGMENT — Continued.

Plaintiff waived his claim for more than \$3 for labor. *Held*, that a demurrer to the counter-claim was properly sustained, and that plaintiff was entitled to a judgment on the pleadings. *Stevens v. Andrews*, 402.

4. If judgment is rendered for the defendant on demurrer to the declaration or to any material pleading in chief, the plaintiff can never after maintain, against the same defendant or his privies, any similar or concurrent action for the same cause, upon the same grounds as were disclosed in the first declaration. *Schroers v. Fisk*, 599.

JURISDICTION:

1. Jurisdiction in the court is power to hear and determine the particular case involved. If this power to hear and determine the particular case does not exist in the court in point of law, then there can be no jurisdiction in the case. If it does exist, then, to confer actual jurisdiction of the particular case, or subject-matter thereof, the jurisdictional power of the court must be invoked by such measures and in such manner as is required by the local law of the tribunal. Where this is done, it is then *coram judice*; if not done, there is at least error, if not want of validity, in the proceedings. *Bassick M. Co. v. Schoolfield*, 46.

2. Plaintiffs, in an action of replevin before a justice of the peace, recovered judgment for \$265. Defendant appealed to the county court, where a verdict was rendered for plaintiffs for \$365, an amount in excess of the justice's jurisdiction. Plaintiff did not offer to remit the excess. *Held*, that the court should have dismissed the action. *Thornily v. Pierce*, 250.

3. Defendant in an attachment suit objected to the jurisdiction of the county court, on the grounds that the justice, before whom the case was first tried, did not cause notice of the suit to be published as required by law; and that the constable did not retain the summons put into his hands for serving until the date of the trial. *Held*, that by filing his appeal bond in the appellate court, the defendant waived objection to the jurisdiction of that court. *Charles v. Amos*, 272.

4. The act of February 10, 1883, section 3, providing that in all civil cases, both at law and in equity, the superior courts shall, within the cities and towns for which they are created, have concurrent jurisdiction with the district court, and that the proceedings, practice and pleadings therein shall be the same as in the latter court, is not in violation of article 5, section 24, of the state constitution. *Denver Circle R. Co. v. Nestor*, 403.

JUSTICES OF THE PEACE:

1. Appeals from judgments of justices of the peace in cases of forcible entry or unlawful detainer lie to the county court. *Reynolds v. Larkins*, 126.

2. The territorial jurisdiction of justices of the peace in these actions is co-extensive with their respective counties. *Ib.*

3. A justice of the peace has, under the statute, jurisdiction to try the issue raised by an answer in garnishee process setting forth that the garnishees held property by virtue of a chattel mortgage to them, to which a traverse is made alleging fraud and delaying creditors, and charging the garnishees with knowledge and participation in the fraud. *Welsh v. Noyes*, 133.

4. Under the statutes, the superior court of Denver has jurisdiction in appeals from decisions of justices of the peace in garnishment causes. *Ib.*

See PRACTICE IN JUSTICES' COURTS.

LICENSE:

1. The charter of April 7, 1874, of the city of Denver, giving to the city council power to control its streets, to regulate the construction and operation of street railways, and the running of locomotive engines and cars, and the location and construction of railroad tracks within the city, does not confer upon the council such authority to license the construction of railroad tracks lengthwise of its streets and thoroughfares generally, as to charge the purchasers of abutting property with notice that they may be so used by railroad companies for the running of their trains, in common with every other mode of conveyance. *Denver Circle R. Co. v. Nestor*, 408.

2. Under the authority of the charter of April 7, 1874, of the city of Denver, defining the powers of the city council with regard to the railroads within the city, and Revised Statutes, 1868, page 619, section 5, limiting the city's title to the streets dedicated to it, to a qualified fee, the license given by the city council to a railroad company to construct a track and run its trains lengthwise of a street of an addition is an appropriation of such street to an extraordinary use, not within the contemplation of the act of dedication, nor authorized by any legislative sanction for general application throughout the city, and cannot afford immunity from liability for actual injuries thereby resulting to the property of abutting owners. *Ib.*

LIENS:

1. Under the statute (sec. 2155, Liens), judgment is to be rendered *according to the rights of the parties*, and each party is to have a lien established and determined upon the property to which his lien shall have attached. *Bassick M. Co. v. Schoolfield*, 46.

2. In an action to enforce a mechanic's lien on defendant's entire property, in which several intervenors also claimed liens upon the entire property, and one upon a portion only of the property, a decree was made establishing liens in favor of the different parties in accordance with their respective claims. *Held*, that an order of sale of the entire property, directing *pro rata* distribution of the proceeds among all said lienholders, was unauthorized and void. *Ib.*

3. In Colorado attorney's fees are not taxable; they are regulated by contract between him and his client. *Fillmore v. Wells*, 228.

4. The attorney's statutory lien upon a judgment covers all fees, or balances of fees, due for services previously rendered his client, whether the amount of such fees has been agreed upon or is to be settled in a suit, as upon a *quantum meruit*. *Ib.*

5. Such lien reaches the fruits of a judgment relating to realty as well as the fruits of money judgments. *Ib.*

6. The attorney may waive his right to the benefit of his lien; and if, without notice that he intends to enforce the same, an innocent third person purchases the realty covered by the judgment, or the judgment debtor make a *bona fide* settlement of the judgment, the attorney cannot hold the realty on the one hand, or look to the debtor on the other. *Ib.*

7. A suit may be brought in equity for the enforcement of this lien, and the amount of the attorney's compensation, together with controversies relating to the contract of employment, may be determined in such suit. *Ib.*

8. The attorney's lien attaches under the statute, even though the land recovered by the judgment becomes part of a trust estate belonging to wards, and suit may be brought directly against this

LIENS — Continued.

part of the trust estate, without first obtaining individual judgments against the guardians. *Ib.*

9. A., being the owner of an entire estate, leased the same to B. for a term of years, who erected a building on the premises. A mechanic's lien was filed against the leasehold interest. B. subsequently sold his leasehold interest to A. *Held*, that the entire estate became subject to the lien. *Evans v. Young*, 316.

10. The lien of the mechanic or material-man, under the statute, begins with the commencement of the work or furnishing material under his express or implied contract with his employer, and attaches upon whatever estate the latter may have at the commencement of such work or the furnishing materials, and is superior to all after-acquired liens and any prior liens or incumbrances of which the mechanic or material-man had no actual or constructive notice. *Tritch v. Norton*, 337.

11. Courts do not enforce contracts between parties, the execution of which is legally impossible. *Ib.*

12. The rule of *caveat emptor* applies against a mechanic as well as in the case of a vendee. *Ib.*

13. If a contractor proposes to erect a building or to put labor or materials on a piece of ground, it behooves him to assure himself of the fact that the person with whom he contemplates making his contract, or for whose benefit he is about to employ means or labor, has such an interest or title unincumbered as will enable him to avail himself of a valid lien. *Ib.*

14. Under our system of registration, if the mechanic or material-man fails to inform himself, the law will not relieve him against the consequences of his own negligence. *Ib.*

LIMITATIONS: See PLEADINGS, 9; STATUTE OF LIMITATIONS.

MANDAMUS:

1. A county, under a statute authorizing the funding of its floating indebtedness, by an election conducted in substantial conformity to the statute, voted to issue bonds as a means of funding such indebtedness. *Held*, that the plaintiff, a holder of county warrants constituting a part of such floating debt, was entitled, upon tendering his warrants, and refusal on the part of the county commissioners to issue to him bonds to the amount of such warrants, to a *mandamus* to compel them to do so. *Board Co. Com'rs Summit Co. v. People ex rel. Hurlbut*, 14.

2. The writ of *mandamus* should never issue unless the party applying for it shall show a clear legal right to have the thing sought by it to be done in the manner and by the person sought to be coerced. It must not only be in the power of such person, but it must be his duty to perform the act sought to be done. *Mayor of Aspen v. Aspen T. & L. Co.*, 191.

3. *Mandamus* is the remedy when a board of examiners arbitrarily refuse an application for a certificate to practice medicine and surgery. *Harding v. The People*, 387.

4. The alternative writ of *mandamus* must state a cause of action, and its sufficiency in this regard may be tested by answer, as upon demurrer. *Wheeler v. Northern C. T. Co.*, 582.

5. Upon tender of the rate fixed and compliance with reasonable regulations established, if the carrier has water undisposed of, the consumer is entitled to its use. And *mandamus* lies where his demand is refused. *Ib.*

6. The alternative writ of *mandamus* cannot be amended by substituting therein a new cause of action. *Ib.*

MECHANICS' LIENS: See LIENS.**MEDICINE — PRACTICE OF:**

1. The act entitled "An act to protect the public health and regulate the practice of medicine in the state of Colorado" (Gen. Stat. p. 773), *held* to be not in conflict with section 2, article IV, of the constitution of the United States, nor with that part of the fourteenth amendment which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." *Harding v. The People*, 387.

2. With respect to the "title" of an act under section 21, article V, of the state constitution, the only requirement is that the title clearly express the subject of the act. The inhibition goes to "acts" containing more than one subject. *Ib.*

3. In the absence of any emergency clause, in view of the constitutional provision (sec. 19, art. V), the expression "after the passage of the act," as used in the law, can have but one meaning, namely, after the act goes into effect. In the construction of statutes, general terms are to receive such reasonable interpretation as leaves the provision of the statute practically operative. *Ib.*

4. The provisions of the act show beyond any question that the clear intention of the legislature was to require all persons desiring to practice medicine or surgery within this state to apply for and receive a certificate of qualification from the state board of medical examiners before they were authorized to do so. *Ib.*

5. Every law which imposes a penalty is not, legally speaking, a penal law; that is, a law which is to be construed with great strictness in favor of the defendant. *Ib.*

6. *Mandamus* is the remedy when a board of examiners arbitrarily refuse an application for a certificate to practice medicine and surgery. *Ib.*

MINING CLAIMS:

1. In an action to try title to a mining claim, the court charged the jury that the plaintiff, in order to recover, must prove that he located his claim "by sinking a shaft at least ten feet from the lowest part of the rim at the surface, showing a well-defined crevice; posting at the discovery shaft the usual notice; placing upon the corners and center of the side-lines, stakes, six in all, marked in the usual manner; and record of the claim;" and that if the jury found that the plaintiff proved this, then defendant, in order to make his claim valid, must prove a prior location in like manner. *Held*, that the instruction did not state the requirements of the law as to what the locator of a mining claim must do to make a location, nor did it state the law in regard to marking of the location stakes, or what must be recorded, or when the record must be made, or where; but left the jury to determine the law as well as the fact. *Bryan v. McCaig*, 309.

2. In an action between claimants of a mining claim, there was evidence to show that the ore-house built on the claim by defendant was placed there for the use and benefit of another claim, and the court submitted to the jury the question of good faith and intention of defendant to make an improvement upon the claim. *Held*, not error. To make a building erected upon a mining claim an improvement, under the law requiring annual labor, it must have been placed there for the purpose of benefiting the claim, and for its improvement. *Ib.*

3. The court instructed the jury that plaintiff must prove "that the Apex lode was located by sinking a shaft at least ten feet from the lowest rim at the surface, showing a well-defined crevice."

MINING CLAIMS — Continued.

Held, that the instruction was erroneous, because it did not submit to the jury the question of fact as to whether the crevice contained mineral-bearing rock in place. *Ib.*

4. Under act of congress of March 3, 1881, authorizing the jury to find that the title to the ground in controversy has not been established by either party, a party claiming the right of possession of any part of the public domain, in an adverse suit, by virtue of a mining location, must establish such right by evidence of a compliance with the state and federal statutes relating to the location and holding of mining claims. And it was proper for the court to submit to the jury to find as a question of fact, from the evidence, whether the defendant had complied with such requirements of the statute. *Ib.*

5. Under Revised Statutes of United States, section 2334, providing that the record of a mining claim shall contain a description of the claim located by reference to some natural object or permanent monument, a certificate giving the courses of two mountain peaks, in degrees and minutes, from the discovery shaft, was *prima facie* sufficient, and properly admitted in evidence. *Craig v. Thompson*, 517.

6. In a suit to establish an adverse mining location, the court, of its own motion, instructed the jury concerning the statutory requirements relating to depths of discovery shafts or open cuts, and length of *adits*. *Held*, that as the jury were properly instructed, and their verdict was supported by the evidence, the rejection of instructions offered on the same points was not error. *Ib.*

7. Where one has long since abandoned any rights he may have had in a mining claim, and was not a party asserting any rights in the action, nor was any one authorized to represent him, instructions asked by defendant as to his rights were properly rejected. *Ib.*

8. Where one had made a location of a mining claim, valid in other respects, but had failed to file for record a valid certificate, an amended certificate, made before defendant had acquired intervening rights, would, as to him, relate back to and preserve the claim as originally located and staked. *Ib.*

MISJOINDER:

1. The court exercises a sound discretion, without adhering to any inflexible rule in determining whether there has been a misjoinder of parties in equity. *Fillmore v. Wells*, 228.

2. Where an alleged misjoinder appears on the face of the complaint, the defendant, by answering over and going to trial, waives the right to be heard upon the error, if any, in overruling the demurrer. *Ib.*

3. *Held*, that section 14 of the Civil Code, prior to 1887, related to practice before justices of the peace, and that under said statute it was no misjoinder of parties to include the maker and acceptor of an order as defendants in the same action. *Hughes et al. v. Fisher*, 383.

MORTGAGE:

Under the code, a mortgage cannot be foreclosed without a sale of the mortgaged premises under a decree of foreclosure. *Nevin v. Lulu & W. S. M. Co.*, 337.

MORTGAGEE:

Plaintiff had brought suit for an injunction to restrain defendants for working certain mines which plaintiff then claimed to own absolutely under a certain conveyance. This action was dismissed

MORTGAGEE—Continued.

with plaintiff's consent. *Held*, that he was not estopped from bringing a suit under the same conveyance as a mortgage, claiming payment thereunder, and, in default of payment, foreclosure and sale. *Nevin v. Lulu & W. S. M. Co.*, 357.

MOTIONS:

1. Under Code Colorado, section 397, "every direction of the court made in writing, and not included in a judgment, is an order, and an application for an order is a motion;" and under sections 398 and 399 notice must be given of all motions in a case. Therefore it is error for a court, after the statutory time for answering has expired, to allow a defendant, without notice to the plaintiff, to withdraw a demurrer previously filed, and to file an answer and cross-demand to the complaint. *Mallan v. Higenbotham*, 264.

2. An answer which is evasive, frivolous, and largely made up of legal conclusions, may be properly stricken from the files on motion. *Crane v. Andrews*, 265.

See PRACTICE.

MUNICIPAL CORPORATIONS:

1. Grants of powers to make local assessments are strictly construed and must be strictly followed. *Keese v. City of Denver*, 112.

2. It is a general rule applicable to the corporate authorities of all municipal bodies, that when the mode in which their power on any given subject can be exercised is prescribed by the charter, the mode must be followed. The mode in such cases constitutes the measure of power. *Ib.*

3. An assessment under the statute authorizing the cost of sewers to be levied against property in a district according to area and not based upon value, benefits or improvements, *held* to be a valid assessment under the police power. *Ib.*

4. An objection that the assessments were not made by the city assessor as required by the charter, *held* to be an objection to an irregularity that in no way affected the tax-payer. *Ib.*

5. It is not necessary that the annual appropriation ordinance or bill, required by statute of a city, specify each particular office and the exact sum to be paid the incumbent thereof. *City of Leadville v. Matthews*, 125.

6. In the absence of any constitutional restriction, the power of the legislature to vacate streets and highways, or to invest municipal corporations with this power, cannot be doubted. There is nothing in our constitution prohibiting its exercise except by special legislation. *Whitsett v. Union D. & R. Co.*, 243.

7. The city of Denver was invested by its original charter with authority to open, alter, abolish, * * * streets, avenues, * * * and this provision has been continued in the several amendments since made. *Ib.*

8. A municipal corporation is not warranted by law in exercising its power to vacate streets in an arbitrary manner and without regard to the interest and convenience of the public or of individual rights. But where the power exists and has been duly exercised, the fact that the vacating ordinance provides for the use which is to be made of the street does not aid a property holder who seeks to annul the ordinance on the ground that he is interested in keeping the street open. *Ib.*

9. The rule is that, for any act obstructing a public and common right, no private action will lie for damages of the same kind as those sustained by the public, although in a much greater degree. *Ib.*

MUNICIPAL CORPORATIONS—Continued.

10. The granting of a right of way on a street for a railway by a municipality does not create any liability against the municipality for the damages occasioned by the corporation exercising the rights so granted. The liability in such cases is against the corporation exercising and enjoying the rights so granted. *Sorensen v. Town of Greeley*, 389.

11. The municipal authorities of Denver must exercise ordinary care in keeping the sidewalks free from defects and obstructions, and liability may ensue from injuries occasioned by failure so to do. *City of Denver v. Dean*, 375.

12. Where a city did not construct the sidewalk, and the accident is not occasioned by any act of its officers or agents, before plaintiff can recover he must show that the corporation had notice of the defect causing the injury for a sufficient length of time prior thereto to enable it to cure the defect. Such notice may be actual or constructive. *Ib.*

13. The knowledge of an officer or agent, obtained in the line of his duty, is actual notice to the city. *Ib.*

14. Constructive notice exists where the exercise of ordinary care involves the anticipation of defects that are the natural and legitimate result of use and climatic influences. Such notice also exists where the city has had the means of knowledge for a sufficient time to have cured the defect. *Ib.*

15. The phrase "means of knowledge" is applicable only to visible defects or obstructions, except that it may include also a neglect to anticipate defects naturally arising from use and climatic influences. *Ib.*

16. It is the province of the jury to determine whether or not a certain officer had personal knowledge of the defect causing the injury, and also whether such knowledge was acquired a sufficient length of time previous to the accident. *Ib.*

MURDER:

1. An indictment charging that defendant unlawfully, feloniously, wilfully, purposely, and of his malice aforethought, did kill and murder the deceased, is sufficient to warrant a verdict finding that the homicide was committed with deliberation and premeditation—a finding necessary to authorize the death penalty. *Redus v. The People*, 208.

2. When one is tried as on a charge of murder in the first degree, but the jury find a verdict of murder in the second degree, the error is not cured if the indictment fails to describe the higher grade of the crime. *Ib.*

3. An instruction charging the jury that testimony admitted, tending to show that deceased, when intoxicated, was a quarrelsome and dangerous man, was not material in determining the intent with which defendant acted, unless at the time of the homicide he had knowledge of deceased's character in this respect, is not error. *Ib.*

4. While the owner of property may not commit a homicide for the purpose of protecting it against a trespasser, he is not bound to a passive submission which neither remonstrates nor resists. *Bush v. The People*, 566.

5. On indictment for homicide it appeared that defendant's brother was the owner of a parcel of ground upon which deceased had, without his knowledge or consent, erected a shanty, and of which he was holding possession. The owner, with others, entered upon the land for the purpose either of forcibly ejecting any person that

MURDER — Continued.

might be in possession or removing the shanty without such person's consent, and in the controversy which followed deceased was killed by defendant. The jury were instructed, in substance, that if they should find that the defendant, in company with his brother, or soon after, entered upon the land in furtherance of the common design, and was aiding and advising him therein, and that he was aware at the time that the difficulty had arisen from such entry and design, then the killing would not be justifiable and the defendant should be found guilty. *Held error. Ib.*

NEGLIGENCE:

1. The owner of stock injured by a railroad train upon full compliance with the requirements of the statute is entitled to recover without proving negligence. *Denver & R. G. R'y Co. v. Henderson*, 1.

2. But failing to comply with the statute, such party may still maintain his action at common law, and in such case he is required to establish negligence. *Ib.*

3. Under the statute creating a liability against a railroad company for killing stock, such liability is independent of any question or element of negligence; nor can such imposition of the liability be regarded as a penalty. *Atchison, T. & S. F. R. Co. v. Betts*, 431.

4. Plaintiff, being clearly guilty of contributory negligence, cannot recover for an injury received from a moving railroad train, unless wantonness or gross negligence on the part of employees operating the train be established. *Kennedy v. Denver, S. P. & P. R. Co.*, 493.

5. Where plaintiff himself shows contributory negligence and fails to establish *prima facie* wantonness, judgment of nonsuit may be entered. *Ib.*

NON-RESIDENT DEBTORS:

"Suits before justices shall be commenced in the township in which the debtor resides, unless the cause of action accrued in the township in which the plaintiff resides, in which case the suit may be commenced where the cause of action accrued or is specifically made payable." Gen. St. § 1932. *Held*, that the statute does not apply to non-resident debtors. *Charles v. Amos*, 272.

NONSUIT:

1. Error in overruling a defendant's motion for a nonsuit is obviated by evidence offered in his own behalf which supplies the defect existing in plaintiff's proofs. *Denver & R. G. R'y Co. v. Henderson*, 1.

2. Where plaintiff himself shows contributory negligence and fails to establish *prima facie* wantonness, judgment of nonsuit may be entered. *Kennedy v. Denver, S. P. & P. R'y Co.*, 493.

NOTICE:

1. Where a city did not construct the sidewalk, and the accident is not occasioned by any act of its officers or agents, before plaintiff can recover he must show that the corporation had notice of the defect causing the injury for a sufficient length of time prior thereto to enable it to cure the defect. Such notice may be actual or constructive. *City of Denver v. Dean*, 375.

2. The knowledge of an officer or agent, obtained in the line of his duty, is actual notice to the city. *Ib.*

3. Constructive notice exists where the exercise of ordinary care involves the anticipation of defects that are the natural and legiti-

NOTICE—Continued.

mate result of use and climatic influences. Such notice also exists where the city has had the means of knowledge for a sufficient time to have cured the defect. *Ib.*

4. The phrase "means of knowledge" is applicable only to visible defects or obstructions, except that it may include also a neglect to anticipate defects naturally arising from use and climatic influences. *Ib.*

5. It is the province of the jury to determine whether or not a certain officer had personal knowledge of the defect causing the injury, and also whether such knowledge was acquired a sufficient length of time previous to the accident. *Ib.*

NUISANCE:

1. Towns incorporated under the statute (Gen. St. p. 958) have power to declare what shall be a nuisance, to abate the same, and to impose fines for creating, continuing or suffering a nuisance to exist; also to regulate, restrain and prohibit the running at large of cattle, etc. *Brophy v. Hyatt*, 223.

2. Under the amendatory act of 1879 (Gen. St. p. 999), such towns have the power to authorize the impounding and summary sale of cattle, etc., found running at large contrary to ordinance. *Ib.*

OFFICERS:

1. Every reasonable intendment is to be made in favor of the acts of public officers, who are sworn to perform their official duties correctly, so long as they appear to be acting in good faith, with due care and discretion, and within the limits of their conceded powers. *Smith v. Com'rs Jefferson Co.*, 17.

2. The law does not recognize fractions of days. And when it provides a *per diem* compensation for the time necessarily devoted to the duties of an office, the officer is entitled to his daily compensation for each day on which it becomes necessary for him to perform any substantial official service, if he does perform the same, regardless of the time occupied in its performance. *Ib.*

3. It is not necessary that the annual appropriation ordinance or bill, required by statute of a city, specify each particular office and the exact sum to be paid the incumbent thereof. *City of Leadville v. Matthews*, 125.

4. The knowledge of an officer or agent, obtained in the line of his duty, is actual notice to the city. *City of Denver v. Dean*, 375.

5. Constructive notice exists where the exercise of ordinary care involves the anticipation of defects that are the natural and legitimate result of use and climatic influences. Such notice also exists where the city has had the means of knowledge for a sufficient time to have cured the defect. *Ib.*

6. The phrase "means of knowledge" is applicable only to visible defects or obstructions, except that it may include also a neglect to anticipate defects naturally arising from use and climatic influences. *Ib.*

7. It is the province of the jury to determine whether or not a certain officer had personal knowledge of the defect causing the injury, and also whether such knowledge was acquired a sufficient length of time previous to the accident. *Ib.*

ORDERS: See PRACTICE, 24.**ORDINANCES:**

1. The object of the requirement of the statute, that upon the passage or adoption of an ordinance or by-law the yeas and nays shall be called and recorded, is to fix the individual responsibility for

ORDINANCES — Continued.

municipal legislation, of each member voting, by a permanent record. Any mode by which the vote of each member is clearly and definitely ascertained for the purposes of the record is sufficient; a call of the roll is not to be regarded as essential. *Brophy v. Hyatt*, 223.

2. An ordinance providing for a notice of sale and the payment of the proceeds of the sale of an impounded animal to the owner, after deducting the costs of the proceeding, cannot be considered as declaring or working a forfeiture of the animal, or as in conflict with section 25, article 2, of the constitution. *Ib.*

3. The record of the appointment of a village marshal was read and approved by the board of trustees, as being in accordance with the facts. The validity of his appointment was questioned because the record was interlined. *Held*, that the interlineation was immaterial. *Ib.*

PARTIES:

The rule that one or more plaintiffs may bring suit in equity for the benefit of all others similarly situated or interested is well settled. Equity will assume jurisdiction in such cases to avoid a multiplicity of suits. *Keese v. City of Denver*, 112.

See MISJOINDER.

PARTNERSHIP:

1. If, during the existence of a partnership, goods are purchased and received by it, a declaration by one of the partners after the transaction, or dissolution of the firm, that he would not be responsible for the account, does not relieve him from liability. *McDonald v. Clough*, 59.

2. Defendant Newton was a silent partner of the other two defendants, who were ostensible partners. September 15, 1882, a ninety-days note, bearing the firm name, was given to the plaintiff for \$1,500. The firm name was composed of the names of the two ostensible partners. October 2, 1882, defendant Newton retired from the firm, and another silent partner took his place, but no notice of the change was given and the firm name remained the same. December 16th the note was taken up, marked "Paid" by plaintiff's cashier, and a new note given therefor, bearing the firm name. The cashier testified that the new note was received in payment of the old one. *Held*, in the absence of evidence of an agreement that the new note should be accepted in payment of the old one, the members of the original firm were liable for the debt. *First Nat. Bank of Pueblo v. Newton*, 161.

3. Where suit is brought against a partnership to collect a firm debt, it is error to render judgment against one of the partners alone as for an individual debt. *Craig v. Smith*, 220.

4. The partnership relation is a trust relation, and the members of a copartnership are held to a strict rule of good faith and fair and open dealing. He who assumes the relationship invites the confidence of his copartners and pledges fidelity to the interests of the copartnership. *Jennings v. Rickard*, 895.

5. Plaintiff, being a partner with defendants, by the terms of the partnership was to have one-third interest in claims located by defendants. The partnership was dissolved in the spring of 1878. One of the defendants, while prospecting some years prior to 1878, discovered some "float" on the mountain-side, where a valuable mine was afterwards discovered, and stuck a stake there, with a view of returning at some future time and discovering the vein from which

PARTNERSHIP — Continued.

it came, but did not return until after 1879. *Held*, that while the failure to pursue the search might have been neglect on his part, it was not fraudulent as of course. *Ib.*

6. The relation existing between partners is one of trust and confidence. When dealing with each other in relation to partnership matters they are required to make full disclosure of all material facts within their knowledge in any way relating to the partnership affairs. *Caldwell v. Davis*, 481.

PART PERFORMANCE:

1. Part performance of a parol agreement, for the conveyance of land, is sufficient to authorize courts of equity to compel specific performance of the agreement. *Hunt v. Hayt*, 278.

2. The most important acts, which constitute a sufficient part performance to authorize courts of equity to decree specific performance, are actual possession and the making of permanent and valuable improvements. *Ib.*

3. Such equitable interest may be assigned by the vendee, or party who stands in an analogous position, and the assignee may maintain an action to compel a specific performance of the contract. *Ib.*

PATENT:

1. A patent must be construed according to the act of congress authorizing its issuance; and while the recitals therein set forth may indicate the views of the government officers respecting the rights of the parties, the form and manner of executing the patent must be in conformity to the laws of congress. *Mayor of Aspen v. Aspen T. & L. Co.*, 191.

2. A patent cannot be attacked collaterally. *Ib.*

PER DIEM: See OFFICERS, 2.**PLEADING:**

1. It is a settled question that, when a defendant in ejectment files a cross-complaint assuming to set up equities entitling him to affirmative relief, the facts relied upon therefor must be as fully stated as they are required to be in an original bill praying affirmative relief. *Murray v. Hobson*, 66.

2. A plea in abatement must be specific. The proceedings before a justice on such plea must appear in evidence at the retrial on appeal, and be preserved by the bill of exceptions, or they will not be considered by this court. *Craig v. Smith*, 220.

3. Where an alleged misjoinder appears on the face of the complaint, the defendant, by answering over and going to trial, waives the right to be heard upon the error, if any, in overruling the demurrer. *Fillmore v. Wells*, 228.

4. Under Code, section 60, the claim after judgment that a complaint is insufficient can only be sustained on the ground that the facts contained therein, even if well stated, constitute no cause of action. *Rhodes v. Hutchins*, 258.

5. A complaint stating, in effect, that the defendants made and delivered a promissory note to plaintiff, setting forth a copy of the note, and the amount claimed thereon, with interest from a certain date; that no part of the same has been paid,— contains sufficient facts to sustain a judgment under Code, sections 80, 81. *Ib.*

6. In passing upon a demurrer to a pleading on the ground that it does not state facts sufficient to constitute a cause of action, the court will only inquire whether it can gather from the pleading

PLEADING — Continued.

the requisite facts, ignoring all immaterial matter and unnecessary allegations. Allegations of immaterial matters may be stricken out on motion. *Marix v. Stevens*, 261.

7. An answer which is evasive, frivolous, and largely made up of legal conclusions, may be properly stricken from the files on motion. *Crane v. Andrews*, 265.

8. An appeal bond, the condition of which is "to prosecute the appeal with effect and without delay, and pay whatever judgment might be rendered against appellant on the trial or dismissal of his appeal in the district court," is clearly enough expressed to support an action, when there is a neglect to pay the judgment rendered in the district court. *Ib.*

9. The defense of the statute of limitations may not be raised upon the general allegation that the complaint does not state facts sufficient to constitute a cause of action. Such defense is in the nature of a special privilege and must be pleaded specially, whether the pleading be by demurrer or answer. *Hunt v. Hayt*, 278.

10. Where it does not appear, upon the face of the complaint, that a proposition to convey land was not in writing, the objection should be raised by answer. *Ib.*

11. The legal effect of a plea of tender is an unanswerable presumption of indebtedness to the extent of the tender, and when the tender is brought into court for the use of the plaintiff, that amount is considered as stricken from the complaint. If more is claimed the plaintiff proceeds for the excess of his demand above the tender only. *Supply Ditch Co. v. Elliott*, 327.

12. A demurrer admits all the material facts well pleaded in the pleading to which the demurrer applies. *Ib.*

13. Argumentative pleading is bad under all systems of pleading. *Ib.*

14. In a suit in equity the relief demanded does not limit the plaintiff in respect to the remedy which he may have. The court will disregard the prayer, and rely upon the facts alleged and proved as the basis of its remedial action. *Nevin v. Lulu & N. S. M. Co.*, 357.

15. Where it is sought to recover such damages as are not the usual and natural consequences of the wrongful act complained of, such damages must be specifically set forth. *City of Pueblo v. Griffin*, 366.

16. It is not necessary to negative an exception not embraced within the same clause that defines and creates the offense and which constitutes no part of the description of the offense. When an exception is contained in a distinct section it is a matter of defense. *Harding v. The People*, 387.

17. If the statute creating an offense is silent concerning the intent there need be no intent alleged. *Ib.*

18. The defense of the statute of limitations is in the nature of a special privilege, and, if not specially pleaded, must be treated as waived. It cannot be considered for the first time in this court. Nor can it be considered under the general objection that the complaint does not state facts sufficient to constitute a cause of action. *Jennings v. Rickard*, 395.

19. Plaintiff sued on a due-bill for money borrowed, and for \$5 for work and labor. Defendant admitted owing \$3 for labor, claimed that the due-bill was for money on deposit with him, and for counter-claim alleged that plaintiff occupied a certain dwelling-house by his permission, and had never paid for the same, but did not allege any right or interest in the house entitling him to de-

PLEADING — Continued.

mand rent. Plaintiff waived his claim for more than \$3 for labor. *Held*, that a demurrer to the counter-claim was properly sustained, and that plaintiff was entitled to a judgment on the pleadings. *Stevens v. Andrews*, 402.

20. A failure to reply to matters set up as a defense to an action is an admission of the truth of the facts alleged, but *not* of the legal conclusions deduced therefrom. *Denver Circle R. Co. v. Nestor*, 403.

21. Under the statute, in an action on a promissory note, the answer is required to be verified only when it challenges the *manner* of the *execution* of the instrument. If threats and duress be set up as a defense, such defense is within the statute and must be sworn to. *Parkison v. Boddiker*, 503.

22. Where an injunction issued enjoining a defendant from incumbering or selling his property on the filing a bill for divorce, and the injunction remained in force at the time of an application for temporary alimony, the defendant, in order to avail himself of the fact as a ground of defense, must set up the fact in his answer to the petition. An averment that his answer to the original complaint is made part of his answer to the petition is insufficient. *Cowan v. Cowan*, 540.

PRACTICE:

1. Error in overruling a defendant's motion for a nonsuit is obviated by evidence offered in his own behalf which supplies the defect existing in plaintiff's proofs. *Denver & R. G. Ry Co. v. Henderson*, 1.

2. An unlimited appearance by counsel for defendant in the county court, after appeal from a justice, announcing himself ready for trial, waiving a jury, and permitting a witness to be sworn before calling attention to his motion to quash the service of process, is a waiver of any objection under the motion. And the truthfulness of the record in this court showing these facts cannot be contradicted. *Denver & R. G. Ry Co. v. Neis*, 56.

3. A witness may testify to so much of a conversation between the parties as he may have overheard, the testimony being otherwise competent. *Ib.*

4. Where the judgment includes compensation to which plaintiff is not entitled, it must be reversed. *Ib.*

5. The entry of default and judgment against a defendant before the return day of the summons, in the absence of himself or counsel, is a proceeding *coram non judice*. And the cause remains for trial as though such pretended default and judgment had not been taken. *Yentzer v. Thayer et al.*, 63.

6. Under the statute, if the plaintiff fails to appear before the justice at the hour named in the summons, his record must show either a continuance or dismissal. Being silent in this respect a total discontinuance must be presumed. *Ib.*

7. Where copies of a town plat were examined by court and counsel on a trial to the court, were marked as exhibits, and copies of them attached to the record, and the judge found that the papers were true copies, and that the original was lost, and could not be produced, *held*, that a technical objection, raised on appeal, that the copies were not introduced in evidence, would not be allowed to prevail. *Murray v. Hobson*, 66.

8. The cost bond required of non-residents before commencing suit, if tendered after action brought, even though before the motion to dismiss is interposed, comes too late. *Edgar G. & S. M. Co. v. Taylor et al.*, 110.

PRACTICE — Continued.

9. The right to assign error on the denial of this motion is not waived by pleading over. *Ib.*

10. A stipulation in a case by both parties, made for convenience and expedition, but by which counsel inadvertently admit facts not in accord with the premises, and injurious to their client, may be relieved against; but to strike out a portion of a stipulation on the suggestion of one party is error if such part be material. The entire stipulation should be canceled. *Welsh v. Noyes*, 183.

11. To warrant the execution of an appeal bond by an attorney in fact, authority therefor, of equal extent with the bond, is necessary, and should accompany the bond; and, when the authority of the agent is challenged by motion to dismiss the appeal, it should be produced; but, under General Statutes, section 1986, the appeal should not be dismissed because the appellant does not, upon the bond being declared insufficient, ask leave to file one that is sufficient. Under such circumstances, the court should enter a rule, to be made absolute on the appellant's failing to file such bond within a reasonable time. *Schofield v. Felt*, 146.

12. Where the appeal bond has been filed and approved, and an appeal accordingly prayed, within the ten days fixed by General Statutes, section 1979, the failure to pay to the justice the costs of the appeal within that time is no ground for dismissing the appeal. *Ib.*

13. If the appellant writes, at the close of each instruction to which he excepts, the words "excepted to," there is a substantial compliance with code of Colorado, page 56, section 69, providing that "a party excepting to the giving of the instructions * * * shall not be required to file a formal bill of exceptions, but it shall be sufficient to write at the close of each instruction to which exception is taken the words 'excepted to,' which shall be signed by the judge." The omission of the judge to sign an instruction so excepted to cannot prejudice the rights of the appellant. *Gibbs v. Wall*, 153.

14. Nor is the omission of the appellee to number the instructions prayed by him, and accepted to by the appellant, a fatal defect. *Ib.*

15. An assignment of error upon an instruction which sets out the instruction excepted to *in hæc verba* is sufficient. *Ib.*

16. Where the only issue made by the pleadings is as to the fact of a warranty as to the disposition of certain horses sold by the defendant to the plaintiff, and there is no plea or proof of accord and satisfaction or payment, there is no foundation for an instruction as to the verdict which the jury should render, if they should find that there had been a settlement between the parties, and it is error to give such an instruction. *Ib.*

17. Where an express warranty is alleged and proved, and there is no contention at the trial as to an implied warranty, an instruction as to the effect of an implied warranty, if proven, is inapplicable to the issue, and is calculated to mislead the jury. *Ib.*

18. Under Code Civil Procedure, section 195, which authorizes either party to a suit, upon the refusal of the trial judge to sign a proposed bill of exceptions, to make such bill a part of the record by procuring and attaching to the bill "the affidavit of two or more attorneys of the court, or other persons who were present" at the trial, that the bill "is correct and true," the affidavits of attorneys who had no participation in or connection with the case tried are required; and the affidavit of one such other person is not sufficient. *Thornily v. Pierce*, 250.

PRACTICE — *Continued.*

19. Plaintiffs, in an action of replevin before a justice of the peace, recovered judgment for \$265. Defendant appealed to the county court, where a verdict was rendered for plaintiffs for \$365, an amount in excess of the justice's jurisdiction. Plaintiff did not offer to remit the excess. *Held*, that the court should have dismissed the action. *Ib.*

20. When a county court by an order grants an unconditional change of venue, and afterwards, by another order, requires the party seeking the change to perfect it by paying accrued costs, the latter order is in effect a mere modification of the former, and is invalid; the county court having no power to require payment of costs as a condition precedent. *South Pueblo N. P. & P. Co. v. Moore*, 254.

21. Under the statute (Gen. St. ch. 22, § 20), changes of venue from county courts may be taken to the county court of any adjacent county, provided that, if no substantial objection is shown, the change shall be taken to the district court of the same county. A county court ordered a change of venue to "the district court of the third judicial district," which district included several counties. *Held*, that the statute did not authorize the change to any district court but that of the county where the cause was pending, and that the order was uncertain as to the court or county to which the change was granted. *Ib.*

22. Under Code, section 60, the claim after judgment that a complaint is insufficient can only be sustained on the ground that the facts contained therein, even if well stated, constitute no cause of action. *Rhodes v. Hutchins*, 258.

23. A complaint stating, in effect, that the defendants made and delivered a promissory note to plaintiff, setting forth a copy of the note, and the amount claimed thereon, with interest from a certain date; that no part of the same has been paid, — contains sufficient facts to sustain a judgment under Code, sections 80, 81. — *Ib.*

24. In passing upon a demurrer to a pleading on the ground that it does not state facts sufficient to constitute a cause of action, the court will only inquire whether it can gather from the pleading the requisite facts, ignoring all immaterial matter and unnecessary allegations. Allegations of immaterial matters may be stricken out on motion. *Marix v. Stevens*, 261.

25. Under Code Colorado, section 397, "every direction of the court made in writing, and not included in a judgment, is an order, and an application for an order is a motion;" and under sections 398 and 399 notice must be given of all motions in a case. Therefore it is error for a court, after the statutory time for answering has expired, to allow a defendant, without notice to the plaintiff, to withdraw a demurrer previously filed, and to file an answer and cross-demand to the complaint. *Mallan v. Higenbotham*, 264.

26. An answer which is evasive, frivolous, and largely made up of legal conclusions, may be properly stricken from the files on motion. *Crane v. Andrews*, 265.

27. The rule that where the evidence is conflicting, and the verdict is not manifestly against the weight of evidence, the verdict will not be disturbed on appeal, applies equally where a jury is waived and the issues of fact are tried by the court. *Kinney v. Wood*, 270.

28. It is not error to require payment of the penalty adjudged upon overruling a demurrer, under section 5 of the code. *Hunt v. Hayt*, 278.

29. When the record does not show that a default was not prop-

PRACTICE — Continued.

erly entered, the presumption arises that the required notice was given. *Evans v. Young*, 316.

80. Except in the case of the agreement provided for in section 962, General Statutes, the law requires in all criminal cases that the jury return to and declare their verdict in open court. *Harding v. The People*, 387.

81. A failure to reply to matters set up as a defense to an action is an admission of the truth of the facts alleged, but *not* of the legal conclusions deduced therefrom. *Denver Circle R. Co. v. Nestor*, 403.

82. Section 30 of the Colorado act of March 14, 1877, providing for the formation of corporations, which provided for service of summons in suits against them, was repealed by implication by the act of March 17, 1877, providing "a system of procedure in civil cases in courts of justice," section 37 establishing a new method of service. *Little Bobtail G. M. Co. v. Lightbourne*, 429.

83. It is not error to admit evidence of the value of services performed by a real estate broker in corroboration of his statement as to the express agreement for such services, and to support an allegation of the express agreement contained in the complaint. *Buckingham v. Harris*, 455.

84. The admission in rebuttal of evidence which has been shown in chief, or which, more properly, should have been introduced in chief, is not error, as it is a matter within the discretion of the court. *Ib.*

85. It is not necessary to reserve exceptions to the several provisions of a decree or judgment to entitle a party to assign error, and have reviewed any alleged defect therein, provided a general exception has been duly taken to the judgment or decree. *Cowan v. Cowan*, 540.

PRACTICE IN THE SUPREME COURT:

1. If an instruction is not properly incorporated into the record, or if no exception appears to have been taken thereto, appellant will not be heard to complain. *McDonald v. Clough et al.*, 59.

2. An objection that the evidence did not support the verdict will not be inquired into an appeal, where the bill of exceptions shows affirmatively that the evidence elicited in the case is not contained therein. *Gibbs v. Wall*, 153.

3. Where a cause is submitted upon briefs to be filed within a time fixed by the court, and the appellant makes no attempt to comply with the order of submission, the case will be dismissed for want of prosecution. *Howlett v. Tuttle*, 222.

4. Where the evidence on the trial was conflicting the judgment will not be reversed on the ground of insufficient evidence to support it. *Polk v. Mook*, 326.

5. When the record shows no foundation for the errors assigned they will be disregarded on appeal. *Leach v. Lothian*, 439.

6. Where nothing appears in the record to the contrary, the regularity of all proceedings in courts of general jurisdiction must be presumed. *Parkison v. Boddiker*, 503.

PRACTICE IN JUSTICES' COURTS:

1. The entry of default and judgment against a defendant before the return day of the summons, in the absence of himself or counsel, is a proceeding *coram non judice*. And the cause remains for trial as though such pretended default and judgment had not been taken. *Yentzer v. Thayer et al.*, 63.

PRACTICE IN JUSTICES' COURTS — Continued.

2. Under the statute, if the plaintiff fails to appear before the justice at the hour named in the summons, his record must show either a continuance or dismissal. Being silent in this respect a total discontinuance must be presumed. *Ib.*

3. The payment to a justice of the peace of the cost of granting an appeal from his judgment within ten days of the rendition of the judgment is not a condition precedent to the right of appeal. *Carbonate Town Co. v. Ives*, 81.

4. A plea in abatement must be specific. The proceedings before a justice on such plea must appear in evidence at the retrial on appeal, and be preserved by the bill of exceptions, or they will not be considered by this court. *Craig v. Smith*, 220.

5. "Suits before justices shall be commenced in the township in which the debtor resides, unless the cause of action accrued in the township in which the plaintiff resides, in which case the suit may be commenced where the cause of action accrued or is specifically made payable." Gen. St. § 1932. *Held*, that the statute does not apply to non-resident debtors. *Charles v. Amos*, 272.

6. Defendant in an attachment suit objected to the jurisdiction of the county court, on the grounds that the justice, before whom the case was first tried, did not cause notice of the suit to be published as required by law; and that the constable did not retain the summons put into his hands for serving until the date of the trial. *Held*, that by filing his appeal bond in the appellate court, the defendant waived objection to the jurisdiction of that court. *Ib.*

7. *Held*, that section 14 of the Civil Code, prior to 1887, related to practice before justices of the peace, and that under said statute it was no misjoinder of parties to include the maker and acceptor of an order as defendants in the same action. *Hughes et al. v. Fisher*, 883.

PRINCIPAL AND SURETY: See BONDS ON APPEAL, 5.

PRIVILEGED COMMUNICATIONS:

To entitle a party to the protection accorded to privileged communications, the communications must have been made to the counsel, solicitor or attorney acting, for the time being, in the character of a legal adviser, and must be made by the client for the purpose of professional advice or aid upon the subject of his rights and liabilities. *Caldwell v. Davis*, 481.

PROMISSORY NOTES:

1. In an action on a promissory note by an indorsee, where the defense was that the interest clause in the note, when delivered to the payee, read as follows: "With interest at — per cent. per — from — until paid," and that the indorsee subsequently, without authority, filled up the blanks so as to make the note read, "With interest at two per cent. per month from date until paid," *held*, on demurrer to the answer, that the delivery of the note with such blanks did not impart authority in the holder to fill them, and that such insertions made by the indorsee without the knowledge or consent of the maker rendered the note void. *Hoopes v. Collingwood*, 107.

2. Defendant Newton was a silent partner of the other two defendants, who were ostensible partners. September 15, 1892, a ninety-days note, bearing the firm name, was given to the plaintiff for \$1,500. The firm name was composed of the names of the two ostensible partners. October 2, 1892, defendant Newton retired from the firm, and another silent partner took his place, but no

PROMISSORY NOTES—Continued.

notice of the change was given and the firm name remained the same. December 16th the note was taken up, marked "Paid" by plaintiff's cashier, and a new note given therefor, bearing the firm name. The cashier testified that the new note was received in payment of the old one. *Held*, in the absence of evidence of an agreement that the new note should be accepted in payment of the old one, the members of the original firm were liable for the debt. *First Nat. Bk. Pueblo v. Newton*, 161.

8. Under the statute, in an action on a promissory note, the answer is required to be verified only when it challenges the *manner* of the *execution* of the instrument. If threats and duress be set up as a defense, such defense is within the statute and must be sworn to. *Parkison v. Boddiker*, 503.

See **BILLS OF EXCHANGE**.

PURCHASE AT TAX SALE:

1. Under the statute of 1877, a purchaser at a tax sale is protected against the mistakes of the assessor or other official, and the liability of the county to the purchaser cannot be made to depend upon the liability of the officer to the county. The liability of the county is created by the mistake of the officer; when created its enforcement is not made to depend upon any contingency. *Hurd v. Hamill*, 174.

2. If a county is possibly liable to a purchaser at tax sale for failure of his title, the county commissioners may assume the defense of a suit against such purchaser and the county treasurer, to test the title, and, in such case, the county will be liable for the costs and lawyer's fees. *Ib.*

RAILROADS:

1. The owner of stock injured by a railroad train upon full compliance with the requirements of the statute is entitled to recover without proving negligence. *D. & R. G. R'y Co. v. Henderson*, 1.

2. But failing to comply with the statute, such party may still maintain his action at common law, and in such case he is required to establish negligence. *Ib.*

3. In a proceeding to set aside a report of commissioners awarding compensation and damages in a proceeding condemning lands for railroad purposes, it was alleged that an agreement granting a right of way over certain adjoining land, procured by the railroad company for the benefit of the owners injured, thereby connecting and improving the lands sought to be condemned, had not been taken in consideration by the commissioners in making their report. *Held*, that as such agreement was only a few months old, had not been recorded, nor in any way brought to the attention of the public, and there had been no use of the way by the public, it was of no effect as a dedication such as could benefit the owner. Nor can it be said that by virtue of such an agreement an easement attached, as appurtenant to the land sought to be condemned. *Burlington & C. R. Co. v. Schweikart*, 178.

4. The constitution of Colorado (article 2, § 15), and the eminent domain act (Code Civil Proc. 74), contemplate a compensation in money to one whose lands are condemned for railroad purposes, and therefore, being inadmissible to reduce his compensation, the commissioners had no power to consider the agreement. The acceptance of such privilege cannot be compelled, but depends on the consent of the parties. *Ib.*

5. Under the statute creating a liability against a railroad company for killing stock, such liability is independent of any question

RAILROADS — Continued.

or element of negligence; nor can such imposition of the liability be regarded as a penalty. *Atchison, T. & S. F. R. Co. v. Betts*, 431.

6. Plaintiff, being clearly guilty of contributory negligence, cannot recover for an injury received from a moving railroad train, unless wantonness or gross negligence on the part of employees operating the train be established. *Kennedy v. Denver, S. P. & P. R'y Co.*, 493.

7. Where plaintiff himself shows contributory negligence and fails to establish *prima facie* wantonness, judgment of nonsuit may be entered. *Ib.*

See **STREETS AND ALLEYS**.

RATIFICATION:

1. The act of an agent outside of the line of his authority is not binding upon the corporation, but corporate liability may ensue from the subsequent ratification of the unauthorized act. *Hoosac M. & M. Co. v. Donat*, 529.

2. Where a complaint in an action for damages avers the making of a certain contract by a corporation, it is competent to show either an original execution with due authority or a subsequent ratification; and an allegation in the answer that there was no ratification amounts merely to a traverse. *Ib.*

3. Ratification of an unauthorized contract is often presumed from the failure of the principal to repudiate within a reasonable time after notice of its existence; provided the other party, in good faith, expends money and labor under it. *Ib.*

RECEIVER:

1. Courts have no jurisdiction to appoint a receiver except in a suit pending in which the receiver is desired. *Jones v. Bank of Leadville*, 464.

2. The appointment of a receiver does not dissolve a corporation either in law or in fact. *Ib.*

3. The receiver of a bank, under the authority of the proper court, sold the bank's interest in certain mining property, partly on deferred payments due at times expressly stipulated in the agreement. The purchaser was unable to obtain possession, the property being in litigation, and in the hands of another receiver. The evidence not showing an agreement to put the purchaser into possession, *held*, that the court's refusal to compel its receiver to extend the time of the deferred payments was not reviewable. *Alvord v. Strickler*, 89.

RECORD: See **ORDINANCES**, 3.

REPEAL:

Repeals of statutes by implication are not favored. *County of Saguache v. Decker*, 149.

REPLEVIN: See **JURISDICTION**, 2.

RIGHT OF PROPERTY:

1. The return of the officer levying an attachment and execution showing that he took possession of certain chattels under the writ, and had them sold before the trial of an action to determine the title, is sufficient evidence to sustain a verdict for conversion of the property, the title to which was shown to be in complainant. *Schluter et al. v. Jacobs*, 449.

RIGHT OF PROPERTY — Continued.

2. General Statutes, section 2011, provides for summary proceedings to try the right of property, and, if found to be in claimant, for the assessment of damages by the court or jury, and for costs. *Held*, that, having found the property to be in claimant, the court is authorized to receive evidence as to the value of the property taken, although no formal issue of value is raised by the pleadings. *Ib.*

SALE:

1. A purchaser at a sheriff's sale, as well as a party redeeming, is bound at his peril to inquire whether it sufficiently appears on the face of the record that the court had jurisdiction. *Union Iron Works v. Bassick M. Co. et al.*, 24.

2. It is true that courts of equity interfere not only to remove, but to prevent, a cloud upon title, but it is a general rule that the enforcement of a legal right will not be enjoined in equity except upon a clear showing of a right superior to that which it is sought to enjoin. *Ib.*

3. The rule is that a sale of real estate under legal process will not be enjoined because of irregularities in the proceedings, or because the judgment upon which process issued was void, where no serious injury or embarrassment to title is shown as likely to result from allowing the sale to proceed. *Ib.*

SCHOOLS:

1. The statutes vest in the county superintendent of schools a large discretion as to the services necessary to be performed by him in the discharge of his official duty. *Smith v. Com'rs Jefferson Co.*, 17.

2. When he renders to the board of county commissioners an account of his services and mileage for a month or a quarter of a year, made out and verified as the law requires, he has established a *prima facie* case in his favor. No authority exists to reject any item or charge upon inspection merely, unless it clearly appears therefrom that such item is incorrect or illegal. *Ib.*

3. Courts are not disposed to interfere with the exercise of mere discretionary authority. *Ib.*

4. Every reasonable intendment is to be made in favor of the acts of public officers, who are sworn to perform their official duties correctly, so long as they appear to be acting in good faith, with due care and discretion, and within the limits of their conceded powers. *Ib.*

5. The law does not recognize fractions of days. And when it provides a *per diem* compensation for the time necessarily devoted to the duties of an office, the officer is entitled to his daily compensation for each day on which it becomes necessary for him to perform any substantial official service, if he does perform the same, regardless of the time occupied in its performance. *Ib.*

6. Under the statute the accounts of the county superintendent of schools should be kept in such a manner that the officer may not only be able to itemize his accounts as required, but to explain them as well, if called upon to do so. *Ib.*

SET-OFF:

There can be no set-off when the claims are not mutual. A joint demand cannot be set off against a separate demand. *Ingols v. Plimpton*, 535.

See INSTRUCTIONS, 16.

SHERIFF'S SALE:

A purchaser at a sheriff's sale, as well as a party redeeming, is bound at his peril to inquire whether it sufficiently appears on the face of the record that the court had jurisdiction. *Union Iron Works v. Bassick M. Co.*, 24.

SIDEWALKS:

1. The municipal authorities of Denver must exercise ordinary care in keeping the sidewalks free from defects and obstructions, and liability may ensue from injuries occasioned by failure so to do. *City of Denver v. Dean*, 875.

2. Where a city did not construct the sidewalk, and the accident is not occasioned by any act of its officers or agents, before plaintiff can recover he must show that the corporation had notice of the defect causing the injury for a sufficient length of time prior thereto to enable it to cure the defect. Such notice may be actual or constructive. *Ib.*

STATUTE OF FRAUDS:

1. The promise to pay the debt of another out of moneys when received, belonging to that other, but to be paid the promisor, is not a promise to pay the debt of another within the meaning of the statute of frauds. *Hughes et al. v. Fisher*, 383.

2. Grants of estate and easements of land are, by the statute of frauds, to be evidenced by properly executed and authenticated written instruments, and, except in cases of fraud on the part of the land owner, are not to be otherwise created. *Stewart v. Stevens*, 440.

See PLEADING, 10; ASSIGNMENT OF DEBT, 5.

STATUTE OF LIMITATIONS:

1. The statute (Gen. Laws, §§ 2914, 2915, 2918) prescribes the manner of presenting claims against the estates of deceased persons, and provides a summary method of establishing such claims upon notice at any term of the court subsequent to the issuing of letters testamentary or of administration. Plaintiffs filed their claim against the estate of defendant's intestate November 17, 1879, on a cause of action which had accrued January 20, 1877. Prior thereto, on February 4, 1878, plaintiffs had filed the claim, but withdrew it March 30, 1878. *Held*, that the claim was barred by the statute of limitations as not having been filed within two years after the cause of action accrued. The filing and withdrawal of the claim did not constitute the commencement of an action to prevent the statute of limitations from running. *Morse v. Clark*, 216.

2. The defense of the statute of limitations may not be raised upon the general allegation that the complaint does not state facts sufficient to constitute a cause of action. Such defense is in the nature of a special privilege and must be pleaded specially, whether the pleading be by demurrer or answer. *Hunt v. Hayt*, 278.

3. The defense of the statute of limitations is in the nature of a special privilege, and, if not specially pleaded, must be treated as waived. It cannot be considered for the first time in this court. Nor can it be considered under the general objection that the complaint does not state facts sufficient to constitute a cause of action. *Jennings v. Rickard*, 395.

STATUTES:

1. Where a statute would operate unjustly, or absurd consequences would result from a literal interpretation of terms and

STATUTES — Continued.

words used, the intention of the framers, if it can be fairly gathered from the whole act, will prevail. *Murray v. Hobson*, 66.

2. A subsequent statute, revising the whole subject-matter of a former statute, and evidently intended as a substitute for it, although it contains no express words to that effect, must operate as a repeal of the former. *Keese v. City of Denver*, 112.

3. Repeals of statutes by implication not favored. *County of Saguache v. Decker*, 149.

4. The act entitled "An act to protect the public health and regulate the practice of medicine in the state of Colorado" (Gen. Stat. p. 773), held to be not in conflict with section 2, article IV, of the constitution of the United States, nor with that part of the fourteenth amendment which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." *Harding v. The People*, 387.

5. With respect to the "title" of an act under section 21, article V, of the state constitution, the only requirement is that the title clearly express the subject of the act. The inhibition goes to "acts" containing more than one subject. *Ib.*

6. In the absence of any emergency clause, in view of the constitutional provision (sec. 19, art. V), the expression "after the passage of the act," as used in the law, can have but one meaning, namely, after the act goes into effect. In the construction of statutes, general terms are to receive such reasonable interpretation as leaves the provision of the statute practically operative. *Ib.*

7. The provisions of the act show beyond any question that the clear intention of the legislature was to require all persons desiring to practice medicine or surgery within this state to apply for and receive a certificate of qualification from the state board of medical examiners before they were authorized to do so. *Ib.*

8. Every law which imposes a penalty is not, legally speaking, a penal law; that is, a law which is to be construed with great strictness in favor of the defendant. *Ib.*

9. It is not necessary to negative an exception not embraced within the same clause that defines and creates the offense and which constitutes no part of the description of the offense. When an exception is contained in a distinct section it is a matter of defense. *Ib.*

10. If the statute creating an offense is silent concerning the intent, there need be no intent alleged. *Ib.*

11. Courts do not take judicial notice of the statutes of other states; they must be shown like other facts. *Atchison, T. & S. F. R. Co. v. Betts*, 431.

12. This court cannot pass upon the expediency or policy of a statute; these are questions upon which the judgment of the legislature cannot be reviewed by the courts. *People v. Fleming*, 553.

STIPULATION:

A stipulation in a case by both parties, made for convenience and expedition, but by which counsel inadvertently admit facts not in accord with the premises, and injurious to their client, may be relieved against; but to strike out a portion of a stipulation on the suggestion of one party is error if such part be material. The entire stipulation should be canceled. *Welsh v. Noyes*, 133.

STOCK:

1. The owner of stock injured by a railroad train upon full compliance with the requirements of the statute is entitled to recover without proving negligence. *D. & R. G. R'y Co. v. Henderson*, 1.

STOCK — Continued.

2. But failing to comply with the statute, such party may still maintain his action at common law, and in such case he is required to establish negligence. *Ib.*

3. Under the statute creating a liability against a railroad company for killing stock, such liability is independent of any question or element of negligence; nor can such imposition of the liability be regarded as a penalty. *Atchison, T. & S. F. R. Co. v. Betts*, 431.

STOCKHOLDERS:

1. The relation of stockholders to the corporation whose stock they hold is that of contract, and the rights and duties of both parties grow out of contract implied in a subscription for stock, construed by the provisions of the charter or articles of incorporation. *Supply Ditch Co. v. Elliott*, 327.

2. The corporation is a trustee for its stockholders and is bound to protect their interests. *Ib.*

3. Certificates of stock are assignable and pass from hand to hand by indorsement as bills of exchange and promissory notes pass, and holders of such certificates are *prima facie* presumed to be *bona fide* owners thereof. *Ib.*

4. A corporation is ordinarily justified in treating the assignee and holder of certificates of stock as the legal and equitable owner thereof. *Ib.*

5. Any transfer of stock by a corporation upon its books, in the absence of the original certificate, is made at its peril, and the real owner of the stock, evidenced by such certificate, loses nothing thereby; upon stock so issued by wrong or mistake the corporation is liable to a *bona fide* holder thereof. *Ib.*

STREETS AND ALLEYS:

1. In the absence of any constitutional restriction, the power of the legislature to vacate streets and highways, or to invest municipal corporations with this power, cannot be doubted. There is nothing in our constitution prohibiting its exercise except by special legislation. *Whitsett v. Union D. & R. Co.*, 243.

2. The city of Denver was invested by its original charter with authority to open, alter, abolish, * * * streets, avenues, * * * and this provision has been continued in the several amendments since made. *Ib.*

3. A municipal corporation is not warranted by law in exercising its power to vacate streets in an arbitrary manner and without regard to the interest and convenience of the public or of individual rights. But where the power exists and has been duly exercised, the fact that the vacating ordinance provides for the use which is to be made of the street does not aid a property holder who seeks to annul the ordinance on the ground that he is interested in keeping the street open. *Ib.*

4. Under act of February 10, 1883, section 3, prescribing the jurisdiction and practice of the superior courts, it is proper for the clerk of said courts, upon the failure of the judge to appear on the first day of the term, to adjourn the court from day to day, in accordance with the practice of the district court. *Denver Circle R. Co. v. Nestor*, 403.

5. Under the Revised Statutes, 1868, page 619, section 5, by the dedication to the city of Denver of the streets of an addition thereto, platted in accordance with the provisions of the statute in force in May, 1876, the said city acquired only a qualified fee therein, in trust for the public for the *ordinary* and *necessary* purposes to which the streets of a city are usually subjected. *Ib.*

STREETS AND ALLEYS — Continued.

6. The charter of April 7, 1874, of the city of Denver, giving to the city council power to control its streets, to regulate the construction and operation of street railways, and the running of locomotive engines and cars, and the location and construction of railroad tracks within the city, does not confer upon the council such authority to license the construction of railroad tracks lengthwise of its streets and thoroughfares generally, as to charge the purchasers of abutting property with notice that they may be so used by railroad companies for the running of their trains, in common with every other mode of conveyance. *Ib.*

7. Under the authority of the charter of April 7, 1874, of the city of Denver, defining the powers of the city council with regard to the railroads within the city, and Revised Statutes, 1868, page 619, section 5, limiting the city's title to the streets dedicated to it, to a qualified fee, the license given by the city council to a railroad company to construct a track and run its trains lengthwise of a street of an addition is an appropriation of such street to an extraordinary use, not within the contemplation of the act of dedication, nor authorized by any legislative sanction for general application throughout the city, and cannot afford immunity from liability for actual injuries thereby resulting to the property of abutting owners. *Ib.*

8. An action was brought by an owner of property abutting on one of the streets of a certain addition to the city of Denver to recover damages for injuries done to his property by a railroad company in constructing a road and running its trains the length of the street in front of his premises. *Held*, that since the injuries to the property were done after the state constitution went into effect, its provisions in regard to compensation for the taking or damaging of private property for public or private use may properly be invoked in aid of recovery. *Ib.*

See DEEDS, 4.

SUMMONS:

Section 30 of the Colorado act of March 14, 1877, providing for the formation of corporations, which provided for service of summons in suits against them, was repealed by implication by the act of March 17, 1877, providing "a system of procedure in civil cases in courts of justice," section 37 establishing a new method of service. *Little Bobtail G. M. Co. v. Lightbourne*, 429.

SUPERIOR COURT OF DENVER: See GARNISHEE PROCEEDINGS, 1, 2.

SUPERIOR COURTS:

1. Under act of February 10, 1883, section 3, prescribing the jurisdiction and practice of the superior courts, it is proper for the clerk of said courts, upon the failure of the judge to appear on the first day of the term, to adjourn the court from day to day, in accordance with the practice of the district court. *Denver Circle R. Co. v. Nestor*, 403.

2. Under the act of February 10, 1883, superior courts in cities or incorporated towns have jurisdiction of appeals from justices of the peace in civil actions. *Ingols v. Plimpton*, 535.

SURGERY: See MEDICINE — PRACTICE OF.

TAXES:

1. General Statutes 1883, section 2825, and Session Laws 1885, page 317, section 1, vest the board of county commissioners with

TAXES — Continued.

power almost unlimited to correct any errors that may occur in an assessment, either before or after the payment of taxes thereon, and an injunction will not issue to restrain the collection of a tax, at the suit of a property owner alleging that the assessor himself had assessed the property, on an excessive valuation, without giving him an opportunity to make a return. *Breeze v. Haley*, 5.

2. Where no injury is caused by the delay, the failure of the assessor to complete the assessment for delivery to the county clerk by June 25th, the date fixed by General Statutes 1883, section 2856, will not render the tax invalid. Where the assessment was made out and delivered during the first meeting of the board of equalization in July, held to be a substantial compliance with the statute. *Ib.*

3. The fact that the weather, feed and market were unfavorable at the time the treasurer distrained the horses and cattle of the plaintiff for a tax is no ground for injunction to restrain the sale, especially when the plaintiff, by his conduct and requests for time, induced the delay to a season so unfavorable to an advantageous sale. *Ib.*

TAX SALE:

1. Under the statute of 1877, a purchaser at a tax sale is protected against the mistakes of the assessor or other official, and the liability of the county to the purchaser cannot be made to depend upon the liability of the officer to the county. The liability of the county is created by the mistake of the officer; when created its enforcement is not made to depend upon any contingency. *Hurd v. Hamill*, 174.

2. If a county is possibly liable to a purchaser at tax sale for failure of his title, the county commissioners may assume the defense of a suit against such purchaser and the county treasurer, to test the title, and, in such case, the county will be liable for the costs and lawyer's fees. *Ib.*

TENDER:

The legal effect of a plea of tender is an unanswerable presumption of indebtedness to the extent of the tender, and when the tender is brought into court for the use of the plaintiff, that amount is considered as stricken from the complaint. If more is claimed the plaintiff proceeds for the excess of his demand above the tender only. *Supply Ditch Co. v. Elliott*, 327.

TITLES OF BILLS:

Section 21 of article V of the state constitution, prescribing that a bill shall contain but one subject, which shall be clearly expressed in the title, must receive a reasonable interpretation, and whenever a matter contained in the statute may fairly be considered germane to the subject expressed by the title it is sufficient. *Dallas v. Redman*, 297.

TOWNS:

1. Towns incorporated under the statute (Gen. St. p. 958) have power to declare what shall be a nuisance, to abate the same, and to impose fines for creating, continuing or suffering a nuisance to exist; also to regulate, restrain and prohibit the running at large of cattle, etc. *Brophy v. Hyatt*, 223.

2. Under the amendatory act of 1879 (Gen. St. p. 999), such towns have the power to authorize the impounding and summary sale of cattle, etc., found running at large contrary to ordinance. *Ib.*

TOWNS — *Continued.*

3. The object of the requirement of the statute, that upon the passage or adoption of an ordinance or by-law the yeas and nays shall be called and recorded, is to fix the individual responsibility for municipal legislation, of each member voting, by a permanent record. Any mode by which the vote of each member is clearly and definitely ascertained for the purposes of the record is sufficient; a call of the roll is not to be regarded as essential. *Ib.*

4. An ordinance providing for a notice of sale and the payment of the proceeds of the sale of an impounded animal to the owner, after deducting the costs of the proceeding, cannot be considered as declaring or working a forfeiture of the animal, or as in conflict with section 25, article 2, of the constitution. *Ib.*

5. The record of the appointment of a village marshal was read and approved by the board of trustees, as being in accordance with the facts. The validity of his appointment was questioned because the record was interlined. *Held*, that the interlineation was immaterial. *Ib.*

TOWN SITES:

1. Where a trustee in whom is vested, under the law of congress and by patent from the United States, the lands comprising a town site, to be held in trust for the use and benefit of the occupants thereof, has executed a deed of a parcel of such land to one claiming to be a beneficiary of the trust, the legal title of such parcel passes out of the trustee and vests in the grantee; no individual not then a beneficiary can thereafter in his own right question the validity of such conveyance; nor can he, by subsequent intrusion upon the possession of the holder of the legal title, acquire a right to inquire into or litigate the question whether all the preliminaries required by the local law were taken by the party holding the title from the trustee. *Murray v. Hobson*, 66.

2. A deed of land made by the patentee of a town site to a beneficiary under the town-site act granted the land as described, "not interfering with the plan of the streets and alleys adopted in the town plat." *Held*, that this clause did not have the effect to reserve land which would be included within the lines of streets as extended, but which lines were not extended even on the plat, on the theory that such land was within the bounds of projected streets, and that, in ejectment by the successor to the grantee's title, the defendant, a mere intruder, could not set up that the town was entitled, by operation of law or otherwise, to an easement for the extension of its streets and alleys over the tract in question. *Mills v. Hobson*, 78.

3. The legislature is authorized to make all needful rules and regulations for the execution of the trust, concerning town sites, and the appropriation of the proceeds of sale of the trust estate, including the power to direct sales. *Town of Aspen v. Rucker*, 184.

4. The trustee is required, under the statute, to execute deeds to occupants of the town site of the lots to which they are entitled, upon their compliance with the local rules and regulations. But only residents and actual occupants and their assigns are entitled to demand deeds from the trustee by virtue of the act of congress. *Ib.*

5. Purchasers of vacant or forfeited lots in the town site, at sales regularly made pursuant to statute, are entitled to conveyance from the trustee. *Ib.*

6. The courts also have powers in the premises, which may, in proper cases, be called into exercise. But neither the legislature nor the courts are authorized to change the character of the estate

TOWN SITES — Continued.

granted by the government from an estate in trust to one in fee-simple, save by conveyance to beneficiaries who have complied with the law, or by *bona fide* sales made by the trustee under such regulations as the legislature may prescribe. *Ib.*

7. The construction given by the courts of this state to the act of congress is that the town site is required to be held in trust until finally disposed of as trust property. The purpose of the acts of congress was to vest the estate and trust powers, not in the corporation itself, but in the trustee in his official or politic capacity, and to limit it to the successor in trust, until the trust should be finally exhausted. *Ib.*

8. An entry in the name of the corporate officials of a town cannot, by construction of law, inure to vest the estate in the corporation. *Ib.*

9. A corporation may maintain a bill to prevent an abuse of the trust when abuse is imminent. *Ib.*

10. No claimant of lots comprising a portion of a town site is a beneficiary of the trust, or entitled to conveyance without proof of actual occupation, either by the claimant or his grantors, whether such claimant be an individual or a town company. *Mayor of Aspen v. Aspen T. & L. Co.*, 191.

11. The legislature, in prescribing rules for the execution of the trust, cannot change it by substituting other parties to receive its benefits than those indicated by the law of congress. *Ib.*

12. The law was made for the benefit of the occupants of the town, and not for speculators. *Ib.*

TRUSTEE:

Where a trustee in whom is vested, under the law of congress and by patent from the United States, the lands comprising a town site, to be held in trust for the use and benefit of the occupants thereof, has executed a deed of a parcel of such land to one claiming to be a beneficiary of the trust, the legal title of such parcel passes out of the trustee and vests in the grantee; no individual not then a beneficiary can thereafter in his own right question the validity of such conveyance; nor can he, by subsequent intrusion upon the possession of the holder of the legal title, acquire a right to inquire into or litigate the question whether all the preliminaries required by the local law were taken by the party holding the title from the trustee. *Murray v. Hobson*, 68.

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ULTRA VIRES:

1. A town which, exceeding its corporate powers, grants permission to a mining company to build a flume in its streets, does not thereby become liable for damage done to adjoining premises by the water leaking from the flume on to such premises. *Town of Idaho Springs v. Filteau*, 105; *Same v. Woodward*, 104.

2. It is a general rule applicable to the corporate authorities of all municipal bodies, that when the mode in which their power on any given subject can be exercised is prescribed by the charter, the mode must be followed. The mode in such cases constitutes the measure of power. *Keese v. City of Denver*, 112.

VENUE:

1. When a county court by an order grants an unconditional change of venue, and afterwards, by another order, requires the party seeking the change to perfect it by paying accrued costs, the latter order is in effect a mere modification of the former, and is invalid; the county court having no power to require payment of costs as a condition precedent. *South Pueblo N. P. & P. Co. v. Moore*, 254.

2. Under the statute (Gen. St. ch. 22, § 20), changes of venue from county courts may be taken to the county court of any adjacent county, provided that, if no substantial objection is shown, the change shall be taken to the district court of the same county. A county court ordered a change of venue to "the district court of the third judicial district," which district included several counties. *Held*, that the statute did not authorize the change to any district court but that of the county where the cause was pending, and that the order was uncertain as to the court or county to which the change was granted. *Ib.*

VERDICT:

1. The rule that where the evidence is conflicting, and the verdict is not manifestly against the weight of evidence, the verdict will not be disturbed on appeal, applies equally where a jury is waived and the issues of fact are tried by the court. *Kinney v. Wood*, 270.

2. Except in the case of the agreement provided for in section 982, General Statutes, the law requires in all criminal cases that the jury return to and declare their verdict in open court. *Harding v. The People*, 387.

VERIFICATION:

Under the statute, in an action on a promissory note the answer is required to be verified only when it challenges the *manner* of the *execution* of the instrument. If threats and duress be set up as a defense, such defense is within the statute and must be sworn to. *Parkison v. Boddiker*, 503.

WATER RIGHTS:

1. By the constitution, title to the unappropriated waters of the state is vested in the public, with a perpetual right to its use in the people. *Wheeler v. Northern C. I. Co.*, 582.

2. A priority of right to this use for beneficial purposes is, with certain limitations, acquired by priority of appropriation. *Ib.*

3. After appropriation, except perhaps as to the quantity actually flowing in the consumer's ditch or lateral, the title remains in the public, with the paramount right of user, unless forfeited, in the appropriator. *Ib.*

4. To constitute a valid appropriation the water diverted must within reasonable time be applied to some beneficial use. But the priority of an appropriation may date, proper diligence having been exercised, from the commencement of the ditch. *Ib.*

5. The carrier acquires certain rights in connection with the water diverted, but it does not become a *proprietor* thereof. *Ib.*

6. It is a *quasi-public* servant, charged with certain duties, and subjected to a reasonable control. It has, in general, a monopoly of the business, and, at common law, could not coerce compliance with unreasonable regulations or charges. *Ib.*

7. But the constitution provides for a tribunal to fix the maximum rate, in case of disagreement, and forbids the enforcement of unreasonable demands in relation to the time and conditions of payment. *Ib.*

8. The carrier is entitled to compensation for carriage, but it cannot charge for the *right to use water* from its canal. Nor can it exact in advance a part or all of its transportation charge, for the remaining years of its corporate life, as a condition precedent to use for the current irrigating season. *Ib.*

9. Under the constitution the county commissioners can only be authorized to establish the maximum *amount* of the rate. They cannot be empowered to dictate the exact rate that shall be collected, or to fix the *time* or *conditions* of payment. The time and conditions of payment are proper subjects for legislation. *Ib.*

10. Prior to 1887 the statute did not authorize the county commissioners of a given county to establish a maximum rate if the head of the canal was located in another county. *Ib.*

11. The consumer's rights may be waived, and a voluntary contract as to these matters may be binding upon him. *Ib.*

12. Section 311 of the General Statutes is not repealed, and it commands the carrier, having water undisposed of, to furnish it, upon

WATER RIGHTS — Continued.

payment of the established rate, to the class of persons using it, in the manner named by the articles of incorporation. If the carrier has a rate of its own, with which the consumer is satisfied, he is not required to apply to the commissioners to fix a maximum rate. *Ib.*

18. Upon tender of the rate fixed and compliance with reasonable regulations established, if the carrier has water undisposed of, the consumer is entitled to its use. And *mandamus* lies where his demand is refused. *Ib.*

YEAS AND NAYS: See ORDINANCES, 1.

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